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SOCIOLOGY & ECONOMIC

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick, Chairman

James H. Quello

Patricia Diaz Dennis

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-352

In re Applications of

EUNICE WILDER and SHERIDAN BROADCASTING CORP. d/b/a WEYBURN BROADCASTING LIMITED PARTNERSHIP	File No. BPH-851213MN
WKIE-FM, INC.	File No. BPH-851216OA
GREATER RICHMOND RADIO, LTD.	File No. BPH-851216OH
BERTRAM BROADCASTING GROUP	File No. BPH-851216OM
BARBARA B. BENNS	File No. BPH-851216ON
JAMES RIVER COMMUNICATIONS CORPORATION	File No. BPH-851216OO
FUTURE BROADCAST LIMITED PARTNERSHIP	File No. BPH-851216OV
WITJO BROADCASTING, INC.	File No. BPH-851216OX
PENNY DRUCKER	File No. BPH-851216QB
VIRGINIA COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-851216QE

For Construction Permit for a
New FM Station on Channel 266A
in Richmond, Virginia

Appearances

Morton L. Berfield, Roy W. Boyce, and *Lewis I. Cohen*, on behalf of Eunice Wilder and Sheridan Broadcasting Corp. d/b/a Weyburn Broadcasting Limited Partnership; *William E. Kennard, Terrence J. McCartin, Susan F. Heck*, and *David A. Naimon*, on behalf of WKIE-FM, Inc.; *Jeffrey D. Southmayd* and *Stephen C. Simpson*, on behalf of Greater Richmond Radio, Ltd.; *Thomas L. Root* and *Lorretta K. Tobin*, on behalf of Bertram Broadcasting Group; *Lauren A. Colby*, on behalf of Barbara B. Benns; *Richard J. Bodorff, Jonathan W. Emord, John K. Hane*, and *John C. Masterson*, on behalf of James River Communications Corporation; *Frederick W. Finn, Robyn G. Nietert*, and *Robert J. Rini*, on behalf of Future Broadcast Limited Partnership; *Israel Teitelbaum*, on behalf of Witjo Broadcasting, Inc.; *David M. Silverman, Robert G. Scott, Jr.*, and *Kenneth A. Grant*, on behalf of Penny Drucker; *Gregg P. Skall, Dan J. Alpert, M. Tracy Neuhauser, Patricia S. McKim, Edward P. Taptich, Grier C. Raclin, Lauren K. Voltmer*, on behalf of Virginia Communications Limited Partnership; and *Linda R. Bocchi*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
JOSEPH CHACHKIN

Issued: June 26, 1989; Released: July 3, 1989

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Eunice Wilder and Sheridan Broadcasting Corp. d/b/a Weyburn Broadcasting Limited Partnership (Weyburn), WKIE-FM, Inc. (WKIE), Greater Richmond Radio, Ltd. (GRR), Bertram Broadcasting Group (Bertram), Barbara B. Benns (Benns), James River Communications Corporation (James River), Future Broadcast Limited Partnership (Future), Witjo Broadcasting, Inc. (Witjo), Penny Drucker (Drucker), and Virginia Communications Limited Partnership (VCLP). These applications, along with those of twenty-four other applications, which have been dismissed,[1] were designated for hearing by the Assistant Chief of the Audio Services Division, Mass Media Bureau, by *Hearing Designation Order*, DA 87-1213, MM Docket No. 87-352, released September 8, 1987 (*HDO*).

2. With regard to the applicants who continue to prosecute their applications, the following issues have been specified:

1. To determine where there is a reasonable possibility that the tower heights and locations proposed by the following applicants would constitute a hazard to air navigation: Weyburn,[2] James River, VCLP.[3]

2. To determine whether Greater Richmond Radio, Ltd. made misrepresentations to or lacked candor with the Commission in certifying to its financial qualifications, and, if so, the effect thereof on its qualifications to be a Commission licensee.[4]

3. To determine, in light of the evidence adduced, whether Greater Richmond Radio, Ltd. is financially qualified to be a Commission licensee.[5]

4. To determine whether Virginia Communications Limited Partnership abused the Commission's processes by withholding information pertaining to its motion to enlarge issues against Future Broadcast Limited Partnership and, if so, the effect of such conduct on its qualifications to be a licensee.[6]

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced, which of the applications should be granted, if any.

3. The designation order permitted the adduction of comparative coverage evidence under the standard comparative issue. The parties have, however, stipulated that there are no significant differences in the proposals of the applicants and that no applicant would claim a preference for comparative coverage (Jt. Ex. 1).

4. A prehearing conference was held on November 19, 1987. Hearing sessions were held on March 14- March 22, 1988, and June 13, 1988. The record was closed on June 13, 1988 (Tr. 2490; *Order*, FCC 88M-1844, released June 16, 1988). Proposed findings of fact and conclusions of law were filed July 20, 1988; replies were filed on August 10, 1988.

FINDINGS OF FACT

Standard Comparative Issue

Weyburn Broadcasting Limited Partnership

Background

5. Weyburn Broadcasting Limited Partnership (Weyburn) is a Virginia limited partnership (Weyburn Ex. 1 at 1). Weyburn consists of:

> Eunice Wilder: General Partner, 30% ownership interest
>
> Sheridan Broadcasting Corporation: Limited Partner, 70% ownership interest

Id.

6. Eunice Wilder (Wilder), the sole General Partner of Weyburn, first became aware of the availability of the FM channel in Richmond, Virginia when she was contacted by Ronald Ross Davenport (Davenport) in September 1985 (Tr. 250, 312-313). Davenport is the President, Chairman and Chief Executive Officer of Sheridan Broadcasting Corporation (Sheridan), the limited partner in Weyburn (Tr. 327). Davenport, in turn, had first become aware that there was an opportunity to apply for a broadcast station to serve Richmond in the summer of 1985, when a consultant for Sheridan, Mr. Leonard Walk (Walk) informed him of the opportunity (Tr. 330). Walk is also a member of the Board of Directors of Sheridan. *Id.* Walk is a paid consultant for Sheridan (Tr. 330).

7. Wilder and Davenport have been friends for more than 35 years (Tr. 250, 352). Davenport contacted her because he knew about the available frequency and thought the station would be a very good business, and because he thought it was something that she might want to get involved in (Tr. 332). Walk had suggested to Davenport that he contact someone who was a resident of Richmond and a minority group individual to get involved in the venture (Tr. 332). Wilder had never expressed to Davenport or his wife an interest in getting involved in the broadcast business (Tr. 252-53). Davenport asked her to give the opportunity some thought, and if she was interested, Wilder was to let Davenport know (Tr. 254). Davenport had no previous business relationship with Wilder (Tr. 352).

8. Wilder's next contact with Davenport in connection with the broadcast application was when she telephoned him to express her interest (Tr. 256-258). During that conversation, the decision was made to move forward on the application (Tr. 334). During that second conversation, Wilder informed Davenport that she had "very limited finances" (Tr. 257). Davenport reassured Wilder that "the costs would be borne by Sheridan" (Tr. 257, 261-262, 334, 336-337, 368). Also during that second conversation, Davenport suggested that a "limited partnership" be formed to apply for the station (Tr. 334). That suggestion was based upon advice given to Davenport by Walk, which was based upon conversations he had with Attorney Morton L. Berfield (Berfield) that a limited partnership was "an appropriate vehicle for an investment" (Tr. 334). The decision that Wilder be the General Partner as well as the amount of her interest in the limited partnership were suggested to her by Davenport (Tr. 335). It was also Davenport who suggested that she receive an equity interest of 30 percent (Tr. 335-336). Wilder did not suggest any percentage (Tr. 336). The equity percentage was not a matter that was negotiated (Tr. 281). Davenport referred Wilder to Berfield to draw up a draft of the agreement that would be entered into (Tr. 259). Davenport or Walk asked Berfield to draft the limited partnership agreement (Tr. 259-260, 338-339). Wilder subsequently received a telephone call from Berfield, saying that she would be sent a rough draft of an agreement for her review (Tr. 262). It was her understanding at that time that Berfield was representing Davenport (Tr. 263). There came a time when she retained Berfield to represent her (Tr. 263). She has not, however, negotiated the terms of Berfield's representation with him (Tr. 264). Bills are sent to her monthly, with a carbon copy sent to Sheridan Broadcasting (Tr. 264). In November 1985, Wilder met with Berfield, Walk, and Davenport in Berfield's office for the purpose of discussing the prosecution of the application and to review the draft of the limited partnership agreement (Tr. 264, 340, 362). The meetings lasted the majority of the day (Tr. 279). The parties met together as a group and individually throughout the course of the day (Tr. 279).

9. Under the terms of the limited partnership agreement, Wilder is not obligated to contribute any capital, but rather, the consideration for her 30 percent ownership interest is services rendered to the limited partnership in the prosecution of the application and a devotion to the management of the station (Weyburn Ex. 1, Attachment A at 2; Tr. 270-271, 342). With respect to prosecution of the application, Wilder has "done what I have been . . . more or less . . . instructed to do by Berfield . . ." (Tr. 282). She has made herself available to Berfield for conferences or consultations, filed certificates in the various courts in the City of Richmond, placed notices in the classifieds of the local newspapers, and prepared some components of the application (Tr. 282-283). Pursuant to the terms of the "Limited Partnership Agreement of Weyburn Broadcasting Limited Partnership," Sheridan has agreed to loan to Weyburn all the funds needed, up to $175,000 for the "legal, engineering, and other professional fees and other costs up to the date of the actual issuance of such construction permit and the funds needed for the construction and operation of said station" (Weyburn Ex. 1, Attachment A at 4). The $175,000 figure does not include the costs involved in going to a comparative hearing (Tr. 366). Sheridan is, however, making those additional sums available, as needed. *Id.* That commitment is in the form of an oral agreement (Tr. 368). Wilder does not believe that she has any obligation, personally, to repay those loans (Tr. 290-291).

10. The transmitter site being proposed by Weyburn was found by Walk, who personally contacted the landowner (Tr. 273-276). Davenport claims that Walk undertook that task at his own initiative (Tr. 359-360), but Davenport admits that he was at the meeting at which it was decided to leave the acquisition of the site to Walk (Tr. 361). Wilder stated that she had not requested that Walk undertake that task (Tr. 274). Although a check was written to the siteowner's agent on behalf of Weyburn (WKIE-FM Ex. 6 at 1), Wilder does not know who wrote the check (Tr. 276-277). She has not seen the check (Tr. 277). Berfield and Walk were also responsible for the selection of the engineer, Compucom (Tr. 278). Walk conferred with several engineers to select the one that was ultimately used (Tr. 278). Wilder testified that she has had no contact with the engineering firm except for receiving and paying bills (Tr. 310-311).

11. Wilder testified that Walk negotiated the terms for the lease of the transmitter site and that Berfield negotiated the terms for leasing station equipment (Tr. 305-307). Wilder states that she has never had any contact with anyone at the leasing company (Tr. 307).

Integration

Quantitative

12. If Weyburn is awarded the construction permit for the radio station in Richmond, Virginia, Wilder, the sole General Partner of Weyburn, proposes to work full-time at least 40 hours per week as General Manager of the station (Weyburn Ex. 2 at 4). As General Manager, she proposes to oversee the order of equipment and construction of the station, manage staff, set salaries and benefits, attend to all other personnel matters, manage the station's EEO program, and exercise overall supervisory responsibility for the programming and business operations of the station (Weyburn Ex. 2 at 4-5).

Qualitative

Residency

13. Wilder moved to Richmond, Virginia in June 1969, and has resided continuously in Richmond from that time to the present (Weyburn Ex. 2 at 1).

Broadcast Experience

14. Wilder has no prior broadcast experience (Tr. 293, 351).

Civic Activities

15. Wilder has been a long standing member and office holder of three black women's service organizations: Links, Girlfriends, and Epicureans (Weyburn Ex. 2 at 2-3). Since 1986 she has been a member of the National Coalition of 100 Black Women, a black women's service organization (Weyburn Ex. 2 at 4). During 1987 through 1988, she was involved in the Coalition's Minority Mentorship Program in which she assisted a minority college student in preparing for a career. *Id.* Since 1985 she has been a member of the Friends of Art of the Virginia Museum of Fine Arts (Weyburn Ex. 2 at 3). In 1987 through 1988, Wilder participated in the Junior Achievement of Richmond program, Leadership Metro Richmond program and the United Way of Greater Richmond's Allocation Committee (Weyburn Ex. 2 at 4).

Minority Enhancement

16. Wilder is a Black female (Weyburn Ex. 2 at 1).

Diversification

17. Neither Weyburn nor Wilder have any interest in any medium of mass communications (Weyburn Ex. 1 at 1; Ex. 2 at 1). Sheridan, the sole Limited Partner of Weyburn, owns three licenses for broadcast stations, WAMO(AM) and FM, Pittsburgh, Pennsylvania; and WUFO in Buffalo, New York (Tr. 327). Additionally, Sheridan Broadcasting Corporation's wholly owned subsidiary, Sheridan Broadcasting Network, has approximately 130 affiliates nationwide including one, WFTH(AM), in Richmond, Virginia (Tr. 328-330). Sheridan Broadcasting Network provides news, sports and special programs for its affiliates (Tr. 328).

18. Ronald Ross Davenport is the President, Chairman and Chief Executive Officer of Sheridan Broadcasting Corporation (Tr. 327).

Auxiliary Power

19. Weyburn will have auxiliary power facilities at its studio and transmitter sites (Weyburn Ex. 1 at 1).

WKIE - FM, Inc.

Background

20. WKIE-FM, Inc. (WKIE-FM) is a Virginia corporation with one class of voting common stock (WKIE-FM Ex. 1). The ownership structure of WKIE-FM is as follows:

Name	Position Held	Interest
Charles E. Cummings	President & Director	45% (VS)
Walton M. Belle	Vice President, Director, & Treasurer	45% (VS)
Larry D. Jones	Vice President, Director, & Secretary	10% (VS)

Id.

21. Belle first found out about the allocation for Channel 266A at Richmond, Virginia through a letter from the FCC (Tr. 412). Belle is an owner of WKIE(AM), and thinks his name is on the FCC mailing lists due to his role as a major participant in WKIE(AM) (Tr. 412). Fifteen Forty Broadcasting Company (Fifteen Forty), the licensee of WKIE(AM), did not apply for the FM frequency because Belle and his partner Charles Cummings did not have full control of the stock of Fifteen Forty at the time applications for Channel 266A at Richmond, Virginia were due (Tr. 413). Belle signed a stock subscription agreement for the stock of WKIE-FM in February 6, 1986 (Tr. 417). He contributed $11,250 for that stock (Tr. 418). The stock was issued on March 11, 1986 (Tr. 418). Larry Jones began work at WKIE(AM) in January 1986 (Tr. 432), and was offered his 10 percent interest in the applicant as part of the inducement for him to accept the position as General Manager (Tr. 432-433). Jones signed a stock subscription agreement for his 10 percent of the stock of WKIE-FM in February 1986, and pursuant to that agreement, he is obligated to pay $2500 for his inter-

est (Tr. 435). He has not paid that sum yet (Tr. 435). Charles Cummings also signed a stock subscription agreement on February 6, 1986 (Tr. 516). He has contributed in excess of $11,250 for the stock (Tr. 517). Expenses for WKIE-FM are paid 50-50 by Cummings and Belle (Tr. 517). Larry Jones is obligated to pay 10 percent of the cost of constructing the station, although it has not yet been determined whether that will be in cash, or whether it will be in a sweat equity (Tr. 521). There is, however, no written agreement which obligates Jones to contribute any additional amounts to the partnership (Tr. 543-546).

Integration

QUANTITATIVE

22. Charles E. Cummings is the proposed Public Affairs and Community Relations Director (Tr. 497). As Public Affairs and Community Relations Director, Dr. Cummings will serve as a liaison between the station and its community. He will oversee station public affairs efforts and will ensure that the station is responsive to its audience (WKIE Ex. 2 at 3). He plans to work full-time at the station (Tr. 497). If WKIE's application is granted, Dr. Cummings pledges to "reduce the time commitments to [his] . . . professional and other activities to fulfill [his]... integration pledge (WKIE Ex. 2 at 3).

23. Dr. Cummings is a physician in internal medicine and family practice (Tr. 492). He devotes an average of 40 to 50 hours per week to his practice (Tr. 493). Dr. Cummings has a contract with five or six HMOs to provide service to patients referred to him by the HMOs (Tr. 493-494). Eighty to ninety percent of Dr. Cummings' patients are HMO referrals (Tr. 494). Dr. Cummings is affiliated with three hospitals - the Richmond Memorial Hospital, the Richmond Community Hospital, and the Richmond Metropolitan Hospital (Tr. 495). Dr. Cummings has a very successful practice (Tr. 495).

24. To effectuate his full-time integration commitment, Dr. Cummings does not plan to discontinue his medical practice (Tr. 497). Rather, he plans to "decrease it down to . . . no more than a few hours a day, three, four or five hours a day." (Tr. 497).

25. Dr. Cummings' earnings as a practicing physician are in the "100,000 range" (Tr. 499). He recognizes that in his proposed position at the station he would earn "anywhere from 40 [meaning thousand dollars] to almost nothing" (Tr. 499).

26. Dr. Cummings takes continuing medical education classes (Tr. 501). He takes these year-round (Tr. 501). He spends one to two hours every week at such courses (Tr. 502). In addition he spends an additional two hours per week at medical conferences (Tr. 502). Dr. Cummings does not know, if WKIE were to obtain a construction permit, if he could discontinue his attendance at medical education courses (Tr. 502). He plans not to participate in medical conferences (Tr. 503).

27. If WKIE receives a grant, Dr. Cummings may maintain his office hours in the morning or early afternoon (Tr. 553). Or, he may commit to maintaining them in the evening (Tr. 556). In point of fact, Dr. Cummings hasn't "worked out" precisely what hours a day he will dedicate to the radio station (Tr. 554). Dr. Cummings will continue to practice medicine until his pension begins in mid-1990 (Tr. 554, 496).

28. Walton M. Belle is proposed to be employed full-time, not fewer than 40 hours per week, as Operations Manager of the proposed station (WKIE-FM Ex. 3 at 3). As Operations Manager, Belle will be responsible for overseeing the station's finances, managing the station's procurement of supplies and equipment, ensuring that the station and its facilities remain in good operating condition, and otherwise assisting the General Manager in the operation of the station (WKIE-FM Ex. 3 at 3). He will spend 6-8 hours per week overseeing the station's finances (Tr. 460). His duties as manager of the station's procurement means that he will make decisions on what will be procured (Tr. 407). However, he testified that the general manager will also make decisions about procurement (Tr. 407). The general manager will have the final word on procurement (Tr. 407). He will spend 6-8 hours per week on this task, as well (Tr. 460). In ensuring that the station and its facilities remain in good operating condition, he will check with engineers concerning the operation of tower lights and the transmitter, and see to it "that the guy wires are okay" (Tr. 408). If any of these matters "needed fixing," it would be his responsibilitiy to ensure that it was fixed (Tr. 409). Finally, he would assist the general manager in "whatever way he asked [him] to help him." Although Belle imagines that assisting the general manager "[will] be a lot of [his job]," no specific duties actually have been established (Tr. 465). He may sell advertising time (Tr. 464-466).

29. Dr. Belle is a general surgeon and has been since 1964 (Tr. 386). He is affiliated with three Richmond area hospitals: Richmond Memorial Hospital, Richmond Community Hospital, and Richmond Metropolitan Hospital (Tr. 387). Dr. Belle has four service contracts with HMOs. The contracts are for one year and may be terminated with 30 days' notice (Tr. 388). If one of the HMOs refers a patient in need of care to Dr. Belle, he is required to provide medical services (Tr. 389). Dr. Belle receives a call almost every day for his services (Tr. 453). Dr. Belle recognizes that pursuant to his oath as a doctor, if he receives one of these customary calls he is obligated to answer it (Tr. 454, 455). Indeed, Dr. Belle goes to the hospital every day (Tr. 454). He recognizes that if he were to receive a call regarding a patient that required medical attention, he would have to attend to that patient (Tr. 457). In an average week, Dr. Belle performs between four and eight operations, comprising 12 to 15 hours per week (Tr. 389, 390).

30. Dr. Belle plans to reduce his commitment to his professional and other activities to fulfill his integration pledge (WKIE-FM Ex. 3 at 3). However, he will not commit to working 9:00 a.m. to 5:00 p.m. or 8:00 a.m. to 4:00 p.m. at the station (Tr. 391-392). Dr. Belle states he plans to give up surgery and just maintain his office practice (Tr. 392). His current office practice hours are from 2:00 p.m. until 6:00 p.m. (Tr. 392). Dr. Belle may work at his office from 9:00 a.m. to 12:00 p.m. and work at the station from 1:00 p.m to 7:00 p.m., or 1:00 p.m. to 8:00 p.m. (Tr. 393). He will resign from the HMOs (Tr. 393). Despite this testimony, Dr. Belle also testified that he would rather perform his medical duties in the morning and work at the station in the evening (Tr. 482). This would be more convenient for his patients (Tr. 482). "I'll be working at the station in the evenings," he testified (Tr. 482). He does not intend to maintain weekend office hours (Tr. 482).

31. Dr. Belle has a pension plan which matures in 1989 (Tr. 394). His pension will provide him $80,000 per year (Tr. 458). Dr. Belle earns as a surgeon an amount over $200,000 per year (Tr. 459). From his other investments he earns $20,000 to $30,000 per year (Tr. 458).

32. Dr. Belle spends approximately four to six hours per month in medical education courses (Tr. 476). Dr. Belle attends approximately one surgical conference per year which may be one full week in length (Tr. 476).

33. Larry D. Jones has proposed to work full-time, not fewer than 40 hours per week, as General Manager of WKIE-FM's proposed station. As General Manager, he will have overall responsibility of the station's employees. His duties will include responsibility for overseeing the station's programming and sales activities. He will resign his current employment and reduce and eliminate his time commitments to other activities to fulfill his integration pledge (WKIE-FM Ex. 4 at 1-2).

Qualitative

Minority Enhancement

34. Charles E. Cummings, Walton M. Belle, and Larry D. Jones are each Black males (WKIE-FM Ex. 2 at 3; Ex. 3 at 3; and Ex. 4 at 2).

Residency

35. Charles E. Cummings is a resident of Richmond, Virginia, and has been a resident since October 2, 1931 except during the periods of 1950-1954 and 1958-1964 (WKIE-FM Ex. 2 at 3). Walton Belle is a resident of Richmond, Virginia, and has been a resident since September 22, 1929 except during a period from 1951 through 1965 when he served in the military and attended college (WKIE-FM Ex. 3 at 3). Larry Jones is not a resident of Richmond, Virginia, and does not reside within the 1 mV/m contour of the proposed station (Tr. 560-561). In the event WKIE-FM's application is granted, he will establish his primary residence in Richmond, Virginia (WKIE-FM Ex. 4 at 2).

Civic Activities

36. Charles Cummings has been involved in the following civic activites:

Since 1984, Cummings has been a member of the board of directors of an organization called "Building A Stable Involved Community (BASIC)." He has also served since 1986 as co-chairman of BASIC's Community Stablity Committee. BASIC, which was organized by the Richmond Rehabilitation and Housing Authority, seeks to improve the living conditions of Richmond's economically disadvantaged residents through educational programs, job training and other communitiy service activities.

Since 1985, Cummings has been a member of the Richmond Chapter of Sigma Pi Phi, a fraternity of black professionals dedicated to community service. Since January 1988, he has been chairman of the Community Outreach Committee of Sigma Pi Phi chapter.

Since September 1986, Cummings has been president of the Community Outreach Committee of the Richmond Medical Society. The Richmond Medical Society is an association of black doctors in Richmond. The Community Outreach Committee sponsors programs to improve the health of disadvantaged members of the Richmond community.

From 1979 to 1980, Cummings served as president of the Old Dominion Medical Society, which is a statewide association of black doctors in Virginia, which also sponsors programs to improve the public health.

From 1979 to 1986, Cummings has served on the Virginia State University Foundation which assists in raising funds for the Virginia State University and oversees the University's use of such funds.

Cummings has been active in efforts to combat hypertension among the residents of Richmond. He has served as a member of the Richmond Heart Association from 1964 to 1967, and served on the Committee on Hypertension of the Virginia Heart Association from 1967 to 1972. In 1972, Cummings was the recipient of the Silver Heart Award from the Virginia Heart Association for his service to that organization. In 1973, Cummings received the Gold Heart Award from the Virginia Heart Association for his efforts in preparing guidelines for physicians to use in screening for hypertension.

In 1975, Cummings received a personal grant from the Virginia Regional Medical Program to screen underprivileged residents of the black community for Richmond for symptoms of hypertension. He organized ten teams of doctors who, using mobile medical vans, tested the Richmond black community for high blood pressure.

From 1965 to 1984, Cummings served as a member of the Advisory Committee of the Virginia Sickle Cell Awareness Program, which conducts programs to increase public awareness of sickle cell anemia and its dangers.

Since the age of seven, Cummings has been a member of the Mount Olivet Baptist Church in Richmond. Since 1986, he has served as vice chairman of the church's Trustee Board, and has served as a member of the Trustee Board since 1983. The Trustee Board is responsible for overseeing the church's finances and facilities. Since 1983, he has served as a member of the church's Outreach Committee and as a member of the church's Scholarship Committee.

(WKIE-FM Ex. 2 at 3-6).

37. Walton Belle has been involved in the following civic activities:

Since 1985, Belle has been a member of the Richmond chapter of Sigma Pi Phi, a fraternity of black professionals dedicated to community service.

Since 1985, Belle has been a member of the board of directors of Richmond Renaissance, a civic organization dedicated to revitalizing downtown Richmond.

From 1968 to 1970, Belle served as a member of the board of directors of the Richmond Urban League.

In 1980, Belle was appointed by the governor of Virginia to serve on the board of directors of the Virginia Science Museum and served as a board member until 1984.

From 1969 to 1971, Belle served as a member of the board of directors of the American Cancer Society.

From 1967 to 1969, Belle served as a member of the board of directors of the Virginia Kidney Foundation.

From 1979 to 1981, Belle served as a member of the board of directors of the North Richmond YMCA.

From 1980 to 1981, Belle served as a board member of Virginia Emergency Medical Services which oversees ambulance and emergency medical services in Richmond.

From 1974 to 1975, Belle served as President of the Old Dominion Medical Society.

Belle is an active member of the African Methodist Church in Richmond, and has served as a member of the Steward's Board since 1967. In 1987, he served as chairman of the church's Bicentennial Committee, which was responsible for overseeing special programs of the church during its bicentennial year.

Since 1965, Belle has been a member of several professional medical societies which sponsor community service activities for the Richmond community, such as blood drives, free blood pressure testing services, and speakers forums on health issues. These associations include the Medical Society of Virginia, the Richmond Academy of Medicine, and the National Medical Association.

(WKIE-FM Ex. 3 at 4-5).

38. In 1983, Larry D. Jones was involved in a Sickle Cell Anemia Bike-A-Thon, a fundraiser to help combat sickle cell anemia in the Richmond area (WKIE-FM Ex. 4 at 2). He participated in that event in conjunction with his duties with the station he was employed with at that time, WPLZ (TR. 565-566). In July 1987, he helped organize a teen anti-drug rally in Richmond (WKIE-FM Ex. 4 at 2). His role with that event was in conjunction with his duties with the station he was employed with at that time, WKIE(AM) (Tr. 567-568).

Broadcast Experience

39. WKIE claims past broadcast experience for Dr. Charles Cummings' involvement as president of Fifteen Forty Broadcast Corporation, licensee of WKIE(AM), Richmond, Virginia since 1979 (WKIE Ex. 2 at 6). Dr. Cummings' responsibility at the station includes oversight of WKIE(AM) management, oversight of the Board of Directors' implementation of decisions, and oversight of management policy and hiring (WKIE Ex. 2 at 7). Dr. Cummings holds neither a management nor employee position at the station (Tr. 506). Dr. Cummings typically spends only a couple of hours a week at the AM station (Tr. 506).

40. WKIE claims past broadcast experience for Dr. Walton Belle's involvement as treasurer of Fifteen Forty Broadcast Corporation, licensee of WKIE(AM), Richmond, Virginia. Dr. Belle helps to ensure that the Board of Directors' policies are implemented and hires and evaluates station managers and personnel. He oversees corporate budgets and finances. He oversees the disbursement of funds, the payments of taxes and the preparation of tax returns (WKIE Ex. 3 at 5; Tr. 401). Dr. Belle does not on a day to day basis have responsibility for implementing the Board's policies; the station's general manager takes care of that function (Tr. 401). Ms. Kim Lewis, the AM Station Manager, is in direct charge of receipts and disbursements (Tr. 404-405). Dr. Belle supervises her work (Tr. 405). Dr. Belle spends 5-6 hours per week at the station during a typical week (Tr. 402).

41. Larry D. Jones served as a full-time Account Executive for WPLZ(FM), Petersburg, Virginia from February, 1981 to April, 1983 (WKIE Ex. 4 at 2). He also served as a full-time Sales Manager for WPLZ(FM) from April, 1983 to January, 1986. Since January, 1986, he has served as General Manager of WKIE(AM) (WKIE Ex. 4 at 2-3).

Diversification

42. As of the last day for filing amendments as a matter of right, Charles Cummings and Walton Belle timely committed to divest their ownership interests in Fifteen Forty Broadcasting Corporation, licensee of Station WKIE(AM), Richmond, Virginia (WKIE Ex. 2 at 1-3; Ex. 3 at 103). Larry D. Jones is the General Manager of WKIE(AM), Richmond, Virginia (WKIE Ex, 4 at 1). Jones timely committed to resign that position (October 29, 1986 amendment).

Auxiliary Power

43. WKIE-FM will install and maintain auxiliary power generators at its transmitter and main studio (WKIE Ex. 5).

Greater Richmond Radio, Ltd.

Background

44. Greater Richmond Radio, Ltd. (GRR) is a limited partnership comprised of one general partner and three limited partners:

Name	Position Held	Interest
Alfred E. Smith	General Partner	10%
Alan Burns	Limited Partner	40%
David H. Williams	Limited Partner	25%
John J. Boyle	Limited Partner	25%

(GRR Ex. 1 at 1; Tr. 591).

45. No partnership agreement is in evidence. Prior to October 1987, no documents existed setting out what the percentage of ownership would be in the applicant (Tr. 656).

46. The "Amended Agreement of Limited Partnership" which governs GRR is dated October, 1987, over 1 year after the applicant filed its application (Tr. 600). The "amended" Limited Partnership Agreement, which in fact, is a complete agreement and which does not amend sections of a prior agreement, was not received in evidence (Tr. 595-596). Smith testified that the "amended" Agreement dated October 1987 was designed to provide better protection for him in his role as general partner

(Tr. 706). Boyle was not sure when he first signed a partnership agreement but knew that he did not sign when he first decided to pursue the venture (BBG Ex. 5 at 4-5). He never saw a draft of any document making changes in the partnership agreement (BBG Ex. 5 at 4-5). Williams confirmed his signature on the amended agreement, and was unaware of any document that governed the partnership before (Tr. 2325-2326). Smith could not recall whether a limited partnership agreement existed before the 1987 amended agreement, and testified that he was unable to find such an agreement in his search for documents to be produced for hearing (Tr. 604-607). Smith was unaware of any document other than the amended agreement and the application form that lists the percentages in the venture held by each partner (Tr. 656). He stated four times that if he had an earlier agreement, he would have produced it in discovery (Tr. 607; 656; 682; 705).

47. David Williams is the owner of a company called Cellar Door Productions which is in the concert business in Washington, Virginia, Maryland, the Carolinas, Florida and Michigan (Tr. 2318). Williams and Boyle are partners in this business (Tr. 2318).

48. Smith, the sole general partner of GRR, first became aware of the opportunity for a radio station when Wayne Jackson contacted him (Tr. 645, 647). Jackson came to Smith while looking for a minority individual for the applicant (Tr. 695). Jackson was a writer for the "Times Dispatcher" who knew of the possibility of an FM radio station being built in Richmond (Tr. 694). Jackson advised Smith that if he was interested in the radio station he should contact Alan Burns who was familiar with the process of applying for and building stations (Tr. 647). Burns, a limited partner, suggested that Williams become a limited partner. Burns had known Williams for about a five or six year period before 1985. Burns worked in programming at a radio station during this time interval. Williams then brought Boyle into the partnership, also as a limited partner (Tr. 684, 685, 2314).

49. In exchange for introducing the prospective general partner, Smith, to Williams, Burns received a 40% share in the equity of the partnership (Tr. 2312). Smith had not known Burns prior to the time Smith became involved in the application (Tr. 603). Burns did nothing more to obtain this interest than make the initial introduction (Tr. 2313). Burns had paid no money for this interest and, as of the hearing, was required to provide no further services (Tr. 2373).

50. Smith testified that the partners had discussed the percentages of responsibility each would assume but had not discussed any actual cost figures (Tr. 652, 673). Smith stated he does not have an understanding as to how much money he would be obligated to put into the partnership (Tr. 657). Regarding his liability as the sole general partner of a limited partnership, Smith understood his responsibility to be to provide ten percent of the funds and to "find funds" to pay any excess obligations (Tr. 666-667). Smith testified that he has not contributed his proportionate share of costs thus far (Tr. 689-690). To date, he has paid $500-$800. While no date for repayment of the other partner's disproportionate contributions has been scheduled, Smith understands he is responsible for ten percent (Tr. 690). However, sometime after his deposition in June 1988, Smith was advised by GRR's counsel that Boyle and Williams were of the view that Smith would not have to put any money into the partnership (Tr. 2295). Smith had no knowledge of this understanding prior to that time (Tr. 2294-2296).

51. It is Burns' understanding that only Williams would put up funds to cover costs (Tr. 2313). Williams concurs that Burns is not obligated to contribute for his share of equity (Tr. 2320). Williams understands that Smith is not obligated to make any financial contribution to the partnership (Tr. 2324). Williams plans to reimburse Smith for any expenses he has incurred on behalf of GRR (Tr. 2325).

52. It was Williams' understanding that by joining the application Smith had begun "a learning process" and Burns was to be Williams' consultant to Smith (Tr. 2328). There was no discussion of how long Burns would be acting in this capacity or what he would do during this learning state (Tr. 2328).

53. Burns was responsible for gathering the information necessary to file the application (Tr. 2328). Smith provided information concerning himself and his family and EEO recruitment sources (Tr. 701-702). Burns located GRR's tower location. He hired GRR's engineering firm, and saw to it that the firm got paid (Tr. 2331). He also recommended the attorney selected by GRR (Tr. 646). Smith never saw a draft copy of the GRR application (Tr. 698). He read and signed the final version (Tr. 695).

Integration

QUANTITATIVE

54. In the event that GRR receives FCC approval for a new FM station in Richmond, Virginia, Alfred E. Smith (the sole general partner of GRR) proposes to work full-time, at least forty (40) hours per week, as General Manager of the radio station (GRR Ex. 1 at 1). As General Manager, he proposes to oversee the operations and manage on a day-to-day basis the business and affairs of the radio station. *Id.*

55. Smith does not know how he will organize GRR's proposed station. He is unsure of how the station will be staffed (Tr. 641). He does not know how the station will be managed (Tr. 641). He doesn't know what salary levels will be set (Tr. 642). Smith plans to discuss staffing and other station requirements with the limited partners before he makes a determination (Tr. 642, 646).

56. Smith is the Executive Director of the Richmond Human Relations Commission, an arm of the City of Richmond. The position is full-time (Tr. 608-609). Smith plans to terminate his employment if the GRR application is granted (GRR Ex. 1 at 1). Smith is also an ordained Baptist minister at the Cornerstone Baptist Church in Cumberland, Virginia (Tr. 621). The church is forty-seven miles west of Richmond (Tr. 622). The church meets only twice a month (Tr. 623). Smith is in his last year of seminary at Virginia Union University School of Theology (Tr. 629). Smith intends to complete his course of study which is due to end in January of 1989 (Tr. 630). The class meets Friday evenings and Saturday mornings (Tr. 630-631). Smith estimated roughly, that his involvement in outside activities including his ministry totalled 12 hours per week (Tr. 638-639).

QUALITATIVE

Residency

57. From 1932 to 1967, Smith resided in Richmond, Virginia. He has resided there continuously from 1983 to the present (GRR Ex. 1 at 2).

Broadcast Experience

58. Smith does not have any broadcast experience (Tr. 648).

Civic Activities

59. Smith is/has been a member of the following civic groups:

National Urban League, Richmond Chapter (Member) (1983 - Present)

NAACP, State and Richmond Chapters (Educational Committee member of the state chapter) (Tr. 607) (1983 - Present)

International Rotary Club, Richmond Chapter (1985 - Present)

Boy Scouts of America (1985 - Present)

Member of Eastend Advisory Board (1983 - Present)

YMCA-YWCA (1983-1984)

Urban Institute (1983 - Present)

BMMAC (Black Men Mobilized Against Crime (1987 - Present)

Civic Improvement Association of Greater Richmond (1986 - Present)

Baptist Ministers Alliance, City of Richmond (1986-Present)

Baptist Ministers Conference (1986 - Present)

Member of Richmond Theologue Fellowship (1987-Present)

60. Smith has affiliations with the following groups:

RUN (Richmond United Neighborhoods) (1983 - Present)

RHDNA (Richmond Historic Development Neighborhood Association) (1983 - Present)

Alpha Phi Alpha Fraternity (1983 - Present)

Delta Sigma Theta Sorority (1983 - Present)

Zeta Sigma Delta Sorority (1983 - Present)

Eastend Senior Citizens (1983 - Present)

Good Shepherd Neighborhood Association (1983 - Present)

100 Black Men (1983 - Present)

Mount Tabor Community League (1986 - 1987)

Progressive Women, Ltd. (1983 - Present)

Big Brothers and Big Sisters, Richmond Chapter (1983 - Present)

Richmond Tenants League (1983 - Present)

Coalition of Multi-Cultural Alliance (1983 - Present)

Richmond Area Athletic Association (1983 - Present)

Eastend Athletic Association (1983 - Present)

Progressive Men's Alliance (1983 - Present)

Baptist Men's Union (1986 - Present)

Juvenile Boy's Home Club (1986 - Present)

Juvenile Girl's Home Club (1986 - Present)

Virginia Correctional Institute (1986 - Present)

(GRR Ex. 1 at 3, 4).

Diversification

61. Neither Smith nor GRR's limited partners have any ownership or official interest in any medium of mass communications (GRR Ex. 1 at 4).

Bertram Broadcasting Group

Background

62. Bertram Broadcasting Group (BBG) is a Virginia limited partnership (BBG Ex. 1 at 1). BBG's ownership as set forth in the limited partnership agreement December 9, 1985, was as follows:

Sheila H. Pickett	General Partner	4 percent equity 4 percent capital gains, capital losses, and credits 10 percent net profits
Bertram I. Weiner	Limited Partner	96 percent equity 96 percent capital gains, capital losses, and credits 90 percent net profits[7]

Id. A Certificate of Limited Partnership was not filed with the State of Virginia until January of 1988 (Tr. 1042) Ms. Pickett was unsure if a signed limited partnership agreement was attached to the Certificate when filed as the Certificate indicates (Tr. 1047). The Certificate was amended by a Certificate of Amendment dated January 25, 1988 (Tr. 1051).

63. Weiner originally learned of the availability of the Richmond allocation after attending a seminar given by the engineering firm of Sachs, Freeman, the purpose of which was to educate potential investors about FM construction permit applications (Tr. 2146; 2186). At the seminar, Weiner learned that the FCC favors integrated principals and also learned which qualities in an integrated principal will enhance an applicant's position in a comparative hearing (Tr. 2186-2187). After attending the seminar, he initiated a search for a general partner to participate in the venture. He especially sought a partner who had preferential comparative qualities, including involvement in civic activities, past broadcast experience, local residency, minority status, and female gender (Tr. 2148-2149). Weiner had decided to "move forward" with the application even before he met Pickett (Tr. 1001). Pickett found out about the possibility of a new FM station from a friend, Pamela Harris, who instructed her to call Weiner (Tr. 905-906). When Pickett called and

revealed her background, he decided that she would make an ideal general partner and decided to form the contemplated partnership with her as its general partner (Tr. 2197-2198).

64. Sachs, Freeman provided Weiner with a pre-application form that requested most of the information required for the completion of the Bertram application (Tr. 2150). Relying upon Pickett's resume and other information he discussed with her via telephone, Weiner completed the pre-application questionnaire which Sachs, Freeman used to prepare the Bertram application (Tr. 2150; 2198; GRR Ex. 3). Because of Pickett's other commitments and obligations, she was unable to complete the pre-application questionnaire herself, and if Weiner had not handled its preparation, it would not have been done (Tr. 2151-2154). When the form was complete, he sent a copy to Pickett (Tr. 2156).

65. After the pre-application questionnaire was turned over to Sachs, Freeman, Weiner called to check on its status and to see if the name of the limited partner was listed as he had requested (Tr. 2214). He took these steps as a "matter of convenience" for Pickett, who otherwise would have had to leave her office and call from an outside pay telephone (Tr. 2217). Weiner was listed as the notice and communication contact on the application as it was filed, and no amendment changing the contact person to the general partner was ever filed, although an amendment filed on February 2, 1988 did list Pickett's address as that of the partnership (Tr. 2217-2218). Along with Pickett, Weiner met with the attorney who ultimately was selected to represent the partnership before the Commission. Weiner participated in the decision to hire that attorney. Pickett wanted Weiner present to gain his approval so that he would pay for counsel's services (Tr. 1092, 2174-2175). At the same meeting, Weiner also took part in discussions on other subjects concerning the application (Tr. 1092). Weiner was also present with the attorney, Root, and Pickett at a subsequent meeting in Richmond to discuss aspects of the application (Tr. 1086).

66. Weiner took several other actions in connection with the filing and prosecution of the application. He hired Sachs, Freeman to prepare the application (Tr. 2161). That firm located the transmitter site proposed on Bertram's application. Their bill was addressed to Weiner personally, and he paid their fee out of his personal funds (Tr. 986; 1084; GRR Ex. 2). Weiner unilaterally certified to the applicant's financial qualifications (Tr. 2180; 2190). Pickett accepted the certification on his word with no supporting documentation (Tr. 1025). Weiner obtained the applicant's equipment cost estimates, which were mailed to him (Tr. 2190). He suggested that the applicant lease equipment and supplied the general partner with estimated operating costs. He arranged for the publication of local public notice (Tr. 2153) and established BBG's inspection file materials at a Richmond area public library (Tr. 2193). Although Pickett lives in Richmond and could have walked to the library, Weiner opened the file by letter from Silver Spring, Maryland (Tr. 1096-1097). He made the decision to hire five or fewer full-time employees and thus avoid filing an EEO program statement (Tr. 2183).

67. Weiner, on the advice of Sachs, Freeman, chose or recommended the limited partnership form for the applicant, and Pickett agreed (Tr. 2158). Weiner prepared the limited partnership agreement based on a form supplied by Sachs, Freeman (Tr. 2157). He marked an "x" next to Pickett's signature line, and forwarded it to her with instructions to sign it (Tr. 1056). He coined the name of the applicant, "Bertram," which of course is his own first name (Tr. 2159). He chose the partnership percentages, based on Sachs, Freeman's recommendation that 4% is the minimum equity that the general partner can hold and still get credit for 100% integration (Tr. 2169). Pickett agreed to the minimum of 4% equity, which Weiner considered to be "generous" (Tr. 2169). Pickett was only required by the original agreement to provide $100 to the partnership, although she contributed a total of $1300 (Tr. 2181).[8] Weiner will provide any further funds in the form of loans (Tr. 1040).

68. Pickett was unable to participate in the early phases of the application preparation and prosecution because of competing demands on her time, including a marriage problem, a full-time job, and responsibility for an aging aunt (Tr. 2152). Pickett did participate, by telephone, in the preparation of the pre-application questionnaire supplied by Sachs, Freeman, from which the application was prepared (Tr. 2151). Specifically, she answered relevant questions about her background, including citizenship, past legal proceedings, and her name and address (Tr. 2160). She also recommended the programming statement (Tr. 1073; 2179). She filed the original Certificate of Limited Partnership (Tr. 2173). She chose the site of Bertram's public inspection file and checked to see if Weiner had set it up properly (Tr. 2193). She discussed projected equipment and operating costs with the limited partner, based on information he obtained (Tr. 1027-1028). Pickett was first contacted directly by an engineer from Sachs, Freeman in January of 1986, a few weeks after the application had been filed (Tr. 994). The engineering, the site acquisition, and the ultimate preparation of the Form 301 application were performed by Sachs, Freeman at the direction of Weiner (Tr. 2166).

69. According to BBG's limited partnership agreement, the limited partner(s) approval must be obtained before doing the following:

> (1) changing the call letters of the station
>
> (2) changing the format of the station
>
> (3) selling part or all of the station, its assets or goodwill
>
> (4) disposing of capital equipment
>
> (5) merging, consolidating or selling before or after award of the construction permit by the FCC
>
> (6) adding additional limited partners
>
> (7) and other actions of like nature or character, beyond day-to-day management.

(BBG Ex. 1, Attachment 1 at 2; Tr. 1065-1069). The agreement also provides that Weiner does not have to contribute any funds requested by Pickett unless he considers it to be a wise investment (Tr. 1067). Weiner determines Pickett's salary, and he may bring in additional limited partners without her consent (Tr. 1067-1068). He may force Pickett out as general partner and substitute in a new general partner if Pickett "can no longer serve, whether because of dissolution or some other reasons" (Tr. 1068). If she was removed, Ms. Pickett would lose her right to her salary and profits (Tr. 1068). The limited partner has the right of first refusal for the general part-

ner's share (Tr. 1069). The limited partner may withdraw at any time without advance notice (Tr. 2208). Also, Pickett is not entitled to any profits, bears no responsibility for losses for capital gains, or for credits until the capital contributions have been "returned" and any indebtedness of the limited partnership which is guaranteed by Weiner has been repaid (BBG Ex. 1, Att. 1 at 3).

Integration

QUANTITATIVE

70. In the event that BBG's application is granted, Pickett is proposed to serve at least 40 hours a week as General Manager of the proposed station (BBG Ex. 2 at 1). As General Manager, she states that she will have the overall responsibility of the station's operation, including the hiring and firing of personnel and overseeing of subordinate personnel and the discharge of their functions. *Id.*

71. Pickett is currently employed as a tax examiner by the Virginia Employment Commission. *Id.* If BBG's application is granted, she will withdraw from this employment and will hold no other part-time or full-time employment. *Id.*

QUALITATIVE

Minority and Female Enhancements

72. Pickett is a Black female. *Id.*

Residency

73. Pickett currently resides in Richmond, Virginia and has lived there since 1982. *Id.*

Broadcast Experience

74. Pickett has held various broadcast positions as follows:

Date	Description
1969-1971	Intern; WWOL, Washington D.C.
1971-1973	Assistant Traffic Manager, Program Logs, News Editing and Disc Jockey; WOOK Radio and WFAN-TV, Washington, D.C.
1973-1975	Director of Continuity and Public Service, Assistant News Director, Assistant Operations Director and Assistant Program Director; WWOL, Washington, D.C.
1975-1979	Director of Continuity, Writer, Producer and Editor of all Commercials, and Accounts Assistant; WASH Radio and WTTG-TV, Washington, D.C.
1979-1982	Account Executive; WBYC, Washington, D.C.

(BBG Ex. 1 at 1-2). Pickett's broadcast experience was not managerial except that of Director of Continuity for WASH and WTTG (Tr. 945). As Director of Continuity, Pickett had a management role, but no supervision was involved. *Id.*

Civic Activities

75. Pickett has been involved in the following civic activities:

Volunteer; Political Campaign for Governor and Lieutenant Governor Campaign in Richmond, Virginia (1984-1985).

Recruiter; Crusade for Voters in Richmond, Virginia (1984-1985).

Member; International Toast Mistresses (1982-present).

Recruiter; The March on Crime (1985).

Member; Churchill Civic Association (1984-present).

(BBG Ex. 2 at 3).

Diversification

76. Pickett has no ownership or official interest in any medium of mass communications (BBG Ex. 2 at 3).

Barbara B. Benns

Background

77. Barbara B. Benns (Benns) is an individual applicant (Benns Ex. 1 at 1). She first learned of the Richmond allocation by reading a list of proposals sent to her by her FCC attorney. She decided to apply because she was acquainted with the Richmond area and had an interest in it (Tr. 1717-1719).

78. At her request, her son William E. Benns III prepared the engineering report for her application and located her proposed transmitter site (Tr. 1723-1724, 1727-1728, 1731). Benns worked with her attorney to prepare the application and the exhibits (Tr. 1730). The application was typed in her office and she assisted in the preparation of the exhibits (Tr. 1730-1731).

Integration

QUANTITATIVE

79. Benns currently works part time for WZAM(AM), Norfolk, Virginia, spending between two and four days per month there to oversee the accounting reports and to "just generally check on what's going on and what's been happening" (Tr. 1732). She has not worked full-time since March of 1987, and has been in semi-retirement since then (Benns Ex. 1 at 2; Tr. 1732).

80. If granted the construction permit, Benns pledges to terminate her activities on behalf of WZAM(AM), move to Richmond, and work as the full-time general manager of the proposed station (Benns Ex. 1 at 3; Tr. 1734). As general manager, she will supervise the station's complement of four full-time employees, including two sales people, one announcer, and an office worker (Tr. 1735). She plans to supervise all aspects of the station herself,

including programming, sales, and engineering departments, the hiring and firing of personnel, and the forming of station policy (Benns Ex. 1 at 3-4).

QUALITATIVE

Residency

81. At the present time, Benns maintains residences in Virginia Beach, Virginia and Washington, D.C. (Benns Ex. 1 at 3). If granted a construction permit for a new FM station at Richmond, Virginia, Benns will move to Richmond, Virginia (Benns Ex. 1 at 3; Tr. 1723).

Broadcast Experience

82. In 1940, Benns assisted with the construction of AM broadcast station WFTM, Fort Myers, Florida, and worked at that station for approximately three years in all areas except sales and on-the-air (Benns Ex. 1 at 1). In 1976, Benns served as president and managing director of WZAM(AM), Norfolk, Virginia, and maintained that position until her semi-retirement on March 1, 1987 (Benns Ex. 1 at 1; Tr. 1732). During this time Benns also served as office manager for WMYK(FM), Elizabeth City, North Carolina (Benns Ex. 1 at 2).

Civic Activities

83. Benns is a member of the Richmond Museum in Richmond, Virginia (Benns Ex. 1 at 3).

Female Enhancement

84. Benns is a female (Benns Ex. 1 at 1).

Diversification

85. Benns is the President, Director and 86 percent shareholder of James River Broadcasting Corporation, the licensee of AM broadcast station WZAM, Norfolk, Virginia (Benns Revised Ex. 2 at 1).

Auxiliary Power

86. Benns proposes auxiliary power (Benns Ex. 3).

James River Communications Corporation

Background

87. James River is a corporation organized under the laws of the Commonwealth of Virginia (James River Ex. 1 at 1). It was incorporated on December 9, 1985, and its certificate of incorporation was issued by the Commonwealth on December 11, 1985 (James River Ex. 1 at 1; James River Ex. 5). The Corporation has Articles of Incorporation that are dated December 9, 1985 (James River Ex. 7). It also has Bylaws dated December 9, 1985 (James River Ex. 8).

88. Claudette Black McDaniel is the sole voting stockholder in James River, possessing all 1,500 shares of the authorized and outstanding voting common stock of the corporation (James River Ex. 1 at 1; James River Ex. 6). This stock was issued on December 11, 1985 and has been owned by McDaniel continuously ever since (James River Ex. 1 at 1; James River Ex. 6). McDaniel also owns 500 shares of non-voting stock in James River (James River Ex. 1 at 1; James River Ex. 6). Both McDaniel's voting and non-voting shares represent 20% of the equity in James River (James River Ex. 1 at 1).

89. The remaining equity in James River consists of 8,000 shares of non-voting stock (James River Ex. 1 at 1; James River Ex. 6). These 8,000 shares are owned by Robert Fish; (James River Ex. 1 at 1; James River Ex. 10). Fish acquired this stock January 15, 1988 from its prior owners, Dr. Renard Charity, Dr. Cynthia Charity and Dr. Michael Kyles (James River Ex. 1 at 1). The Drs. Charity and Dr. Kyles no longer have any ownership interest in or association with James River (James River Ex. 1 at 1). James River's officers and directors are:

Name	Officer/Director
Claudette B. McDaniel	President, Treasurer and Director
Joseph V. Boykin	Director
William D. Bayliss	Secretary

(Tr. 1214). These persons have held these positions continuously since December 11, 1985 (James River Ex. 1 at 2; Tr. 1262, 1204). No other person has ever been an officer or director of James River (James River Ex. 1 at 2). In addition to serving as Secretary of the corporation, Bayliss is its local counsel (Tr. 1204).

90. James River's Articles of Incorporation provides, at paragraph 3, that the non-voting shares of stock entitle the holder to "no right to vote for the election of Directors or upon any other matter, or to receive notice or to participate in any meeting of the stockholders" (James River Ex. 1 at 2). This provision is subject to the exception that the consent as a class of the holder of non-voting stock is necessary to effect major changes in the basic structure of the corporation, such as (i) any alteration of the corporate articles, (ii) a sale of all or substantially all of the corporate assets, or (iii) an approval by the corporation of any plan of merger (James River Ex. 1 at 2).

91. Pursuant to a Memorandum of Understanding between McDaniel and Fish, Fish will not serve as an officer or director of the corporation, will not be permitted to participate in the management or operation of the Corporation's business as an employee, consultant, or in any other capacity, and will not be retained to perform services of any sort for or on behalf of the corporation (James River Ex. 1 at 2).

92. McDaniel first heard of the opportunity to file for a new FM station in Richmond through contacts in the radio industry (Tr. 1263). After hearing word of the availability of the new FM channel, McDaniel began talking to people in radio and looking for someone interested in pursuing the application (Tr. 1264). While conversing with the Drs. Charity concerning a prospective medical center in Richmond District 8, which she was involved with as Vice-Mayor of Richmond, McDaniel was asked if she was aware that a new radio channel was about to become available in the Richmond area (Tr. 1264).

93. The Drs. Charity expressed an interest in becoming involved in the radio project (Tr. 1264). Dr. Renard Charity wanted to know if he could participate in a radio venture with McDaniel (Tr. 1264). McDaniel, on that occasion, had not decided upon a course of proceeding and indicated that she was in the process of talking to

other radio people about the project (Tr. 1264). McDaniel had known the Charity's for about ten years prior to the formation of the applicant (Tr. 1265). McDaniel knew neither Dr. Kyles nor Dr. Boykin personally before the application was filed (Tr. 1265).

94. In her position as Vice-Mayor of Richmond, McDaniel had done some work with the Richmond law firm of Browder, Russell (Tr. 1266). She mentioned to members of the firm that she might be interested in having them help her with a radio project that she desired to pursue (Tr. 1266). McDaniel knew the Browder, Russell attorney she turned to, Jimmy Morris, from her involvement with him in the Gary Hart presidential campaign (Tr. 1266).

95. According to local counsel Bayliss, McDaniel knew many members of the Browder, Russell firm before the incorporation of James River. The firm represented the City of Richmond in an anti-trust lawsuit against Hilton Hotels when McDaniel served as Vice-Mayor. McDaniel got to know a couple of the firm's lawyers through her involvement as vice-mayor. She was also assisted by the firm in personal matters involving real estate on a probate issue. Moreover, she ran for city council against a Browder, Russell partner (Tr. 1258).

96. After consulting her lawyer and thinking some more about how she was going to proceed with her project, McDaniel concluded that she would in fact rely upon the Drs. Charity for financial assistance (Tr. 1269). To provide "seed money" or petty cash for background research on the feasibility of their project, both McDaniel and Mrs. Charity set up a bank account upon a bank form entitled "Unincorporated Organization's Resolutions" (Tr. 1270, 1272; Future Ex. 15).

97. McDaniel paid for telephone calls out of the fund (Tr. 1271). The fund had in it no more than $125 to $130 (Tr. 1271). The bank account was opened before James River existed and was closed one or two months after the James River application was filed (Tr. 1272; 1273). The account was automatically closed by the bank because there was nothing left within it (Tr. 1274).

98. To proceed with the application, McDaniel met with attorneys in her local law firm, Browder, Russell. Specifically, she met with counsel Jimmy Morris and Brian Ball (Tr. 1274). She also met with a realtor (Tr. 1274). McDaniel met with them to determine whether they could be hired to help her pursue the radio project (Tr. 1275). In a second meeting at the firm, a week or two later, McDaniel met with Bayliss (Tr. 1275).

99. Following this visit with counsel, McDaniel then held a lunchtime meeting to introduce her attorneys to the Drs. Charity (Tr. 1276). Upon her return to her office after the meeting, she called Bayliss and instructed him to begin the incorporation process (Tr. 1277).

100. From the beginning of the incorporation process, it was local counsel Bayliss' understanding that the Drs. Charity and Kyles were to be passive investors and would not be officers or directors (Tr. 1257).

101. McDaniel told Bayliss that she wanted the applicant to be called James River Corporation because she lives south of the James (Tr. 1276). McDaniel asked Bayliss to draw up the articles of incorporation (Tr. 1280). Bayliss wanted to know who would be secretary of the corporation (Tr. 1280). McDaniel suggested that he serve in that role and made herself president and treasurer of the corporation (Tr. 1280). McDaniel elected herself to be a director, president and treasurer and elected Bayliss secretary (Tr. 1216, 1289). McDaniel decided that the Drs. Charity would be non-voting stockholders (Tr. 1279).

102. The Drs. Charity were first informed that the applicant would be a corporation and that they would be non-voting stockholders when McDaniels's attorney, Bayliss, called them (Tr. 1278, 1279; 1207).

103. McDaniel and Dr. Boykin are the directors of James River Communications Corporation (Tr. 1286-1287). McDaniel knew of Dr. Boykin because he had some involvement in a jazz program over radio (Tr. 1224). McDaniel met with Boykin and asked him if he would be a James River director. He consented (Future Ex. 17 at 3). Boykin's role as a director was a passive one. The only reason why Boykin was appointed to be a director was that, in McDaniel's understanding of Virginia corporate law, two directors were required (Tr. 1291, 1214). Boykin informed McDaniel that anything that she wanted to do with the corporation was fine with him (Tr. 1290, 1217). McDaniel informed Bayliss that Boykin would act as a director and consultant to the corporation (Tr. 1217).

104. McDaniel and Boykin work at the same hospital but did not know each other personally (Future Ex. 17 at 4). Boykin had no involvement in organizing the corporation (Future Ex. 17 at 4). He was not involved in preparing the articles of incorporation, the bylaws, or the FCC application (Future Ex. 17 at 4-5).

105. Boykin understood his role to be that of a consultant to McDaniel with no involvement in the business at all (Future Ex. 17 at 6). In point of fact, Boykin has never been called upon to consult for the corporation (Future Ex. 17 at 6).

106. Boykin has no familiarity with James River's antenna site, its engineering firm, its bank letters, or its FCC counsel, except in preparation for his deposition (Future Ex. 17 at 9-10, 15-16). Boykin understood his role as director to be quite limited:

> . . . Claudette has always been in charge. I, in no way, wanted to implement any degree of influence in this and whatever she would have given me I would have signed.

(Future Ex. 17 at 13). Each director has one vote in James River (Tr. 1293). However, Boykin gave his general assent to "anything [Claudette] [wanted] to do" (Tr. 1290, 1295, 1218). He agreed that McDaniel would be in charge of corporate management and agreed with her chosen method of management (Tr. 1218-1219, 1222-1223). Boykin knew that the James River application was McDaniel's project and he was interested in helping her pursue her goal and objectives.

107. There is no document or writing indicating Boykin's assent to McDaniel's being president and treasurer (Tr. 1290). However, McDaniel believed such documentation not to matter "because if [Boykin] had not gone along with it, he would no longer be a director" (Tr. 1290).

108. McDaniel signs checks on behalf of the corporation (Tr. 1291, 1217-1218). She authorized herself to do so (Tr. 1291). It is Secretary Bayliss' understanding that

Boykin gave his consent to the "Unanimous Consent of Directors in Lieu of Organizational Meetings . . . " but did not return a signed copy (Tr. 1225; Future Ex. 9).

109. Bayliss called McDaniel and informed her that he had created the James River Communications Corporation (Tr. 1280). The firm had a runner bring the stock information, the articles of incorporation and the bylaws from the firm to McDaniel's office at the Medical College of Virginia (Tr. 1280).

110. The Drs. Charity paid for their stock in James River (Tr. 1298; 1300). The money was paid into an escrow account at Browder, Russell (Tr. 1299). McDaniel paid for her stock in James River (Tr. 1301). McDaniel does not personally know if the non-voting stockholder, Dr. Kyles, ever paid for his stock (Tr. 1302). However, if Dr. Kyles did pay for his stock the money was placed in the Browder, Russell escrow account (Tr. 1304, 1211, 1212). Local counsel and secretary of the corporation, Bayliss, presumes that Dr. Kyles paid for his stock (Tr. 1210).

111. McDaniel is obligated to pay 20 percent of corporate expenses. The non-voting stockholders are obligated to pay 80 percent (Tr. 1310). As of the time of the March 18, 1988 hearing session, McDaniel had paid 35% of applicant costs, 15% above her equity obligation (Tr. 1311; James River Ex. 3). After paying the additional amount, McDaniel made no attempt to get the difference from the 80 percent equity holders (Tr. 1311). The additional 15 percent paid by McDaniel is not a loan to the corporation (Tr. 1311). It is a contribution (Tr. 1312). She acquired no additional equity for this contribution (Tr. 1312).

112. When corporate expenses come due, McDaniel contacts her local attorney, Bayliss, who in turn contacts the non-voting stockholders to acquire their contribution (Tr. 1312). The money was placed in the Browder, Russell escrow account and payments were to be made from the escrow account by William Bayliss (Tr. 1312).

113. McDaniel retained the law firm of Fisher, Wayland, Cooper and Leader to represent her in FCC matters (Tr. 1313-1314; Future Ex. 10; James River Ex. 1 at 2). McDaniel had her counsel Browder, Russell negotiate a site lease agreement with a Mr. Gochenour and with a Mr. Weinstein of American Home Broadcasting, Inc. (Tr. 1317, 1318, 1319, 1232, 1233; Future Ex. 12; Future Ex. 13; James River Ex. 1 at 3). The first site could not be used because it did not come within the acceptable site range (Tr. 1318).

114. McDaniel selected the bank she desired to finance her application (Tr. 1320). She first selected the bank where she had an account, the Bank of Virginia (Tr. 1320). Bayliss, McDaniel's attorney, negotiated with the bank on McDaniel's behalf (Tr. 1320). Browder, Russell submitted financial statements and information to the bank (Tr. 1320; Tr. 1321). McDaniel submitted her financial statement to Browder, Russell (Tr. 1321). McDaniel assumes that the Charitys also supplied their financial information to Browder, Russell (Tr. 1321).

115. Bayliss transmitted financial information to John Vogel at the Bank of Virginia (Tr. 1242). He negotiated the terms of the agreement on behalf of Claudette McDaniel (Tr. 1244). A bank letter was issued on December 11, 1985 (Future Ex. 6). The security for the bank letter consisted of the personal guarantees of McDaniel and the Drs. Charity (Tr. 1246).

116. McDaniel decided that she would be James River's General Manager (Tr. 1322). She did not discuss the matter with the other James River director, Boykin (Tr. 1322).

117. McDaniel traveled to Washington, D.C. and worked with her FCC counsel to draft the James River application (James River Ex. 1 at 3). Although James River issued a stock certificate to non-voting stockholder Dr. Kyles on December 11, 1985 for 1,000 shares, he was not listed in the James River application filed December 16, 1985. McDaniel did not include him in the application because she did not have confirmation of his receipt of his stock (Tr. 1323). McDaniel later believed Dr. Kyles had in fact paid for his stock when she received an amendment from her Washington attorneys, Fisher, Wayland, Cooper and Leader, reporting that he had paid for his stock (Tr. 1326).

118. McDaniel selected her engineering counsel, duTreil, Lundin & Rackley, with advice from her FCC counsel (Tr. 1329; James River Ex. 1 at 2). McDaniel discussed the budget for her station with FCC counsel before she signed her application (Tr. 1331; James River Ex. 1 at 3). McDaniel prepared a written budget (Tr. 1332). At the same time, McDaniel had a general station staffing proposal in mind (Tr 1332; James River Ex. 1 at 3).

119. The non-voting stockholders of James River had no involvement in the preparation of the application, the plan of staffing, the estimation of costs, or the selection of the site. The non-voting stockholders have had no decisionmaking role in the prosecution of the James River application or the supervision of local or FCC counsel's performance or in the authorization of payments to local or FCC counsel (James River Ex. 1 at 3). The non-voting stockholders have signed no official documents for James River, except subscription agreements, a shareholders agreement (in the case of Mr. Fish) and a document to transfer the non-voting stock of the Drs. Charity and Kyles to Mr. Fish (James River Ex. 1 at 3).

120. Toward the end of 1987, McDaniel began looking for a new non-voting stockholder for James River (Tr. 1333). She did so because she believed the Drs. Charity were not enthusiastic about continuing as investors in the venture (Tr. 1333). A large legal bill was owed to FCC counsel that was left unpaid (Tr. 1336). McDaniel asked her local counsel to ask the Drs. Charity to pay that bill (Tr. 1337). The Charitys indicated that they would pay the bill (Tr. 1337). They paid some but not all of it (Tr. 1337). James River's FCC counsel withdrew from the case (Tr. 1336).

121. McDaniel was subsequently contacted by attorney Van Horn, counsel to then applicant Robert Fish. Attorney Van Horn indicated that McDaniel's FCC counsel had withdrawn and asked if there was a problem (Tr. 1337). McDaniel indicated that a bill had been left unpaid and that she was looking for investors to pick up the balance, because she was tired of waiting for the Drs. Charity to make their contribution (Tr. 1338).

122. The day after she spoke with Van Horn, McDaniel contacted her FCC counsel and informed him of the contents of the discussion and asked if he could see if the Drs. Charity would step aside, so that McDaniel could pursue a new non-voting stockholder (Tr. 1339). She had been trying to pursue other investors in addition to the one ultimately selected, Robert Fish (Tr. 1341).

123. McDaniel then met Fish at Van Horn's request at the Sheraton-Jefferson Hotel in Richmond (Tr. 1341). They explored each other's backgrounds (Tr. 1342). Fish discussed with McDaniel her position in the city government; her background; and what her intentions were with the application (Tr. 1118). None of the specifics of the proposed station's operations were discussed (Tr. 1342). Fish indicated that he was interested in investing in James River (Tr. 1343). The two did not discuss the terms of his prospective purchase of non-voting stock (Tr. 1119). Fish then asked his counsel, Arent, Fox, Kintner, Plotkin and Kahn, to find out if the Charitys would be willing to sell their non-voting stock (Tr. 1120). McDaniel took no part in these negotiations (Tr. 1343). Fish and the Drs. Charity thereafter negotiated an agreement among themselves (Tr. 1343).

124. Fish, his counsel, and the Drs. Charity by phone agreed to a stock purchase procedure (Tr. 1121). The terms of the agreement were memorialized in written form (James River Ex. 9). As a result of this agreement, the Drs. Charity and Kyles' non-voting stock was signed over to Fish (Tr. 1134). As a consequence, Fish is responsible for 80% of the costs incurred by James River (Tr. 1137, 1143).

125. Fish premised his investment decision upon his evaluation of McDaniel. He considers her an upstanding person and one well connected in Richmond both politically and socially (Tr. 1156). He determined her to be a good investment risk (Tr. 1156).

126. McDaniel re-retained the firm of Fisher, Wayland, Cooper and Leader under the following terms: that she would be obligated for 20% of the applicant's expenses and Fish would be obligated for 80% (Future Ex. 5). McDaniel authorized her attorneys to draft a Memorandum of Understanding between herself and Fish (Tr. 1345).

127. As an accommodation to Fish, a second bank letter was desired in recognition of Fish's new position as a non-voting stockholder and 80% financial backer of the company (Tr.1158). After McDaniel supplied the Fleet National Bank with her financial data, the bank letter was issued (Tr. 1159; Future Ex. 7).

128. McDaniel spoke with Colin Clampton of the bank (Tr. 1354). McDaniel's attorney requested the bank letter from him (Tr. 1354). McDaniel sent to Clampton three of her own income tax returns at his request (Tr. 1354). According to Fish, Fish informed the bank that it was his intention to make an investment in James River (Tr. 1141). Fish had no previous relationship with Fleet National Bank, although he was familiar with Colin Clapton (Tr. 1144). Fish is not a signatory on the James River bank account (Tr. 1151-1152).

129. Pursuant to the Memorandum of Agreement between McDaniel and Fish, Fish agreed that he will not serve as an officer or director of James River, will not be permitted to participate in the management or operation of the corporation's business as an employee, consultant or in any other capacity, and will not be retained to perform services of any sort for or on behalf of the corporation (James River Ex. 1 at 2; James River Ex. 10). McDaniel specifically asked her attorneys to include a provision 2C in the memorandum (Tr. 7345; James River Ex. 10). By this provision, McDaniel wanted to make it clear that the new non-voting stockholder would not change the corporate structure (Tr. 1346; James River Ex. 10).

130. There exists a revolving note between McDaniel and Fish (Tr. 1160). Under the terms of the note, McDaniel may borrow, if she elects to, up to $20,000 from Fish (Tr. 1162). The loan is personal and, if she borrows upon it, she is required to pay it back at 10% interest (Tr. 1163-1164). On the day of the hearing, the "revolving note" was executed and then submitted into evidence. The note was given to McDaniel by her attorney (Tr. 1355; Future Ex. 8). It was her understanding that if she needed to take out a loan, it would be available to her (Tr. 1355). The note was to help pay application expenses (Tr. 1355). At the time of the hearing, McDaniel had taken no advances on the note (Tr. 1355).

131. Fish knows of no circumstances under which he can remove McDaniel as general manager of the station (Tr. 1153). Fish has passive investments in other investments in addition to James River (Tr. 1156).

Integration

QUANTITATIVE

132. James River proposes to integrate McDaniel full-time (forty or more hours per week) as the station's General Manager (James River Ex. 2 at 1). Her duties will include development and ultimate responsibility for implementation of the station's programming, financial and personnel policies. She will hire, fire and supervise all other management functions (James River Ex. 2 at 1).

133. McDaniel currently holds a full-time position as Section Chief of the Special Activity Unit of the Occupational Therapy Department of the Medical College of Virginia (MCV), a 5,000 bed hospital (James River Ex. 2 at 1). She has been with MCV for 31 years; she supervises six therapists (James River Ex. 2 at 1). She works a minimum of forty, and often more, hours each week (James River Ex. 2 at 1).

134. In the event the James River application is granted, McDaniel will resign from her position at MCV (James River Ex. 2 at 1). McDaniel also spends approximately three hours each week working as the Public Affairs Director at WANT(AM), Richmond, Virginia. She will resign from this position, too, if the James River application is granted (James River Ex. 2 at 1).

135. McDaniel is also employed as city council member/Vice Mayor of the City of Richmond. The City of Richmond has what is known as a "weak mayoral" form of government. The city is divided into nine districts; each district elects one member to the city council. The nine city council members in turn select, from among themselves, a mayor and a vice mayor. The city council members make law and policy for the city and hire the city manager. The mayor presides over the meetings of the council members and is recognized as the head of the government for all ceremonial purposes, for all military purposes and for service of civil process. The vice mayor performs the duties of the mayor in the mayor's absence or disability (James River Ex. 2 at 2). A full-time professional city manager, who is not a councilmember, is responsible for carrying out the law and policies set by the council and for running the city itself. Accordingly, the city council member positions, including those of mayor and vice mayor, are only part-time (James River Ex. 2 at 2). Each of the councilmembers, including the mayor and vice mayor, also holds a full-time position (James River Ex. 2 at 2).

136. McDaniel intends to maintain her position on the Richmond City Council (James River Ex. 2 at 2). She will be able to devote forty or more hours per week to he proposed station as General Manager (James River Ex. 2 at 2). She has been a city council member for seven years and vice mayor for four years (James River Ex. 2 at 2). Her responsibilities as council member/vice mayor, together, require an average of twelve hours and no more than 15 hours per month (James River Ex. 2 at 2).

137. During the entire time McDaniel has been on the city council, she has held her full-time position at MCV and her part-time position at WANT or another station, WENZ (James River Ex. 2 at 3). If the James River application is granted, McDaniel will discontinue her forty plus hour per week position at MCV and her three hour per week position at WANT. As a consequence 43 or more hours per week will be available to her for full-time service to James River (James River Ex. 2 at 3).

QUALITATIVE

Minority and Female Enhancements

138. McDaniel is a Black female (James River Ex. 2 at 3).

Residency

139. McDaniel currently and has for forty-eight years lived in the City of Richmond and within James River's city grade signal contour (James River Ex. 2 at 3).

Civic Activities

140. McDaniel has the following civic affiliations:

Virginia Legislative Advisory Council, Member, 1968-1974

Richmond City Democratic Committee, Member-at-Large, 1972-Present

Richmond Democratic Women's Club, Member, 1972-Present;

Assistant Secretary, 1975-1979

Richmond Community Services Board, Member, 1976-Present

Omicron Delta Kappa, Member, 1984-Present

National Leadership Honor Society, Member, 1979-Present

Richmond Public Relations, Member, 1968-1979

American Association of Health, Physical Education and Recreation, Member, 1969-Present

Virginia Recreation and Parks Society (Therapeutic Branch), Member 1968-Present

National Recreation and Parks Association (Therapeutic Branch), Member 1968-Present

Virginia Division of American Cancer Society, Public Information Committee, Member 1970-1979

American Red Cross (Public Relations for Richmond), Member, 1970-1976

National Council of Negro Women, Member 1972-Present

NAACP, Member, 1957-Present

Eta Phi Beta Sorority, Member, 1970-Present

Zeta Phi Beta Sorority, Member, 1968-Present

Peoples' Political and Civic League, Member, 1961-Present

League of Women Voters, Member, 1970-Present

Richmond Urban League, Member, 1968-Present

Board of Corrections, Commonwealth of Virginia, Member, 1970-1973; 1981-1985

(James River Ex. 2 at 4).

141. Beginning at age 9, McDaniel worked until 1969 at WANT(AM), Richmond, Virginia (James River Ex. 2 at 3). She was the hostess of a program entitled "Claudette and Guest." She was also responsible for putting all public service announcements on the air (Tr. 1357). From 1969 until 1983, McDaniel was employed as a part-time Public Affairs Director at WENZ(AM), Richmond, Virginia (James River Ex. 2 at 4). There she also hosted a program entitled "Claudette and Guest," and determined what public service announcements should be aired at the station (James River Ex. 2 at 4). She was a part-time employee at WENZ(AM) (Tr. 1358). From 1984 until the present, McDaniel has served as the part-time Public Affairs Director at WANT(AM), Richmond, Virginia (James River Ex. 2 at 4). She continues to host a public affairs program entitled "Claudette and Guest" and she determines what public service announcements will be broadcast on the station (James River Ex. 2 at 4). She works on average about three hours per week at the station (Tr. 1358).

Diversification

142. McDaniel has no ownership or official interest in any medium of mass communications except her employment as Public Affairs Director of WANT(AM) (James River Ex. 3 at 1). McDaniel intends to resign her position with WANT(AM) if James River's application is approved. *Id.*

Auxiliary Power

143. James River will install auxiliary power facilities in order to permit continuous broadcast operation in the event of a power failure (James River Ex. 4).

Future Broadcast Limited Partnership

Background

144. Future Broadcast Limited Partnership (Future) is a limited partnership organized pursuant to the laws of the state of Virginia (Future Ex. 1 (revised)). The partners of Future and their respective ownership interests as of the "B" cut-off date are as follows:

Name	Interest	Equity
Sheila Spurlock	General Partner	10%
Leo Denslow	Limited Partner	45%
Vincent T. Ridikas	Limited Partner	45%

Id.

145. On October 19, 1987, Future amended its limited partnership agreement to increase Spurlock's equity interest to 21%, in exchange for a capital contribution of $500, and services that she had already agreed to provide (Tr. 1599, 1602). Subsequently, on January 29, 1988, Future amended its application to report that Spurlock's ownership interest had been increased to 25%, that Ridikas had withdrawn as a limited partner and that Denslow now held a 75% equity interest. These ownership changes, having occurred after the "B" cut-off date, are not being considered for comparative purposes (Tr. 187). *See* also FCC 87M-3014, released November 20, 1987 and FCC 88M-611, released March 4, 1988.

146. Sheila Spurlock learned of the Richmond allocation from her friends in the media (Tr. 1620). She told them that she was interested in applying for the Richmond station and that she was looking for a "passive investor" because she did not have the necessary funds herself (Tr. 1622). Mark Hutchins, an acquaintance of Spurlock, suggested that she contact Denslow (Tr. 1622-1624).

147. Spurlock telephoned Denslow and told him about the Richmond allocation (Tr. 1625). She tried to "sell" the idea of investing in the application to him. *Id.* She informed him that she is a black woman with some radio experience and that together they could "win" the permit (Tr. 1625). She also asked him if he knew of other passive investors (Tr. 1625). Spurlock pushed for a "face to face" meeting with Denslow because she knew she could not get a commitment from him "sight unseen." *Id.*

148. Denslow testified that Spurlock informed him that "she was interested in having someone put up the money to accomplish the project and [he had] occasion to travel to [her] neck of the woods and that . . . he'd like to set up a meeting with her" (Tr. 1566). Spurlock met with Denslow at an airport near Richmond, in November 1985 (Tr. 1571, 1703) while travelling with Ridikas in connection with a cable television project (Tr. 1570). Denslow testified that Ridikas did not express an interest in the application before he attended the meeting. *Id.*

149. The meeting lasted between fifteen minutes and an hour (Tr. 1571). Spurlock told Denslow and Ridikas about her background. She reiterated the fact that she was a broadcaster, and recited her "civic involvements, her commitment to the community, her family relationships" (Tr. 1572).

150. Spurlock testified that Denslow mentioned the possibility of Ridikas being an investor in the application (Tr. 1637). Spurlock also informed them at the meeting that she did not want to make any financial contributions to this venture and that "she felt that she was making contributions that were far more valuable" (Tr. 1575). They did not discuss hiring an attorney or an engineer at this meeting. *Id.*

151. Denslow testified that Spurlock did not present him with a business plan, but they did discuss "how much [she felt] it would cost to get . . . the radio station up and operating" (Tr. 1576). She did not provide him with a pro forma balance sheet. *Id.* She did not discuss the possible program format for the station with them, because "that was not necessarily one of the concerns" (Tr. 1576-1577).

152. Spurlock telephoned Denslow after the Richmond meeting and told him that she had retained the law firm of Brown & Finn in connection with the Richmond application (Tr. 1579). Spurlock decided to structure the applicant as a limited partnership after Brown & Finn outlined the advantages to her (Tr. 1640). Brown & Finn informed Denslow and Ridikas that the applicant would be structured as a limited partnership (Tr. 1646-1647).

153. Ridikas was the limited partner in an application for a new FM station at Fredonia, New York, under the name of Chautauqua Radio Limited Partnership (Chautauqua), filed with the Commission on November 15, 1985 (James River Ex. 12; Tr. 1584). The Chautauqua application was filed prior to the date that Brown & Finn began negotiating the terms of Future's partnership agreement with Denslow and Ridikas (Tr. 1583, 1640). Darrell Bauguess, president of D.B. Communications, Inc., was the engineer that Chautauqua used for the Fredonia application. He was also the engineer that Future used for its application. *Id.* Chautauqua's limited partnership agreement, prepared by the law firm of Cohen & Berfield, was virtually identical to the limited partnership agreement that Brown & Finn prepared for Future (James River Ex. 12) (see Limited Partnership Agreement attached thereto as Ex. 12). According to Denslow, the model limited partnership agreement was not provided to Brown & Finn for the Future agreement (Tr. 1582). Ridikas was also the limited partner in an application for a new FM station in Hardeeville, South Carolina, under the name of Jessup Broadcasting Limited Partnership (Jessup) that was filed on the same date that Future's application was filed (James River Ex. 13). Bauguess and D.B. Communications also prepared the engineering for the Jessup application. *Id.* Jessup used the same form limited partnership agreement that was used for Chautauqua and Future (James River Ex. 13) (see Limited Partnership Agreement attached thereto as Ex. 12).

154. Brown & Finn "negotiated" the equity interests of the Future partners (Tr. 1591, 1652). Spurlock testified that she wanted a 25% interest in Future but Brown & Finn could only get her a 10% interest (Tr. 1653). She testified that Denslow only wanted to give her a 2% interest. *Id.* Spurlock did not contact Denslow or Ridikas directly to discuss her percentage interest, because that was "what [she] hired attorneys to do." *Id.*

155. Brown & Finn negotiated with Denslow and Ridikas for them to pay a total of $10,000 in cash to Spurlock before the partnership agreement was actually signed, because Spurlock needed "some start up money" (Tr. 1708). This $10,000 contribution became the initial capital contribution under Paragraph 7(a) of the partnership agreement (Tr. 1699).

156. Brown & Finn prepared the limited partnership agreement for Future and sent a draft to Spurlock for her review (Tr. 1649, 1660). Spurlock did not suggest any changes to the draft. *Id.*

157. Under Paragraph 7(a) of the partnership agreement, Denslow and Ridikas were each required to make an initial capital contribution of $5,000 (Tr. 1654; Future at 3). Spurlock was not required to make an initial capital contribution in the form of cash (Tr. 1654; Future at 2). The limited partnership agreement provided that she would make her initial capital contribution in the form of services. *Id.*

158. Pursuant to Paragraph 9 of the partnership agreement, Denslow and Ridikas were also required to make loans to Future up to the same of $600,000 (Future at 3, Tr. 1593-94). Paragraph 9 provides in part that:

> To the extent that funds in excess of the initial capital contributions are necessary, the Limited Partners agree, subject to this Section 9, to loan to the Partnership the costs incurred by the Partnership in pursuit of a construction permit from the FCC for the operation of a station to be located in Richmond, Virginia, including all legal, engineering and other necessary professional fees and other costs up to the date of the actual issuance of such construction permit and defense of such permit in any court appeal, and the funds needed for the construction and operation of said station, not to exceed $600,000.

(Future at 3). Denslow testified that Brown & Finn suggested the $600,000 figure (Tr. 1593). Spurlock testified that she has not repaid any of the loans and that it is her understanding that she "[does not] have to make the repayment until the station is set up and it's making some profits" (Tr. 1708).

159. Paragraph 10 of the partnership agreement, entitled "Distribution of Profits" provides that "net profits derived from the operation of the partnership property shall be distributed among the partners in accordance with their respective percentage ownership interests" (Tr. 1654-1657, Future at 5). Paragraph 16, entitled "Dissolution and Liquidation" provides that "Upon termination of the partnership for any reason, the partnership shall transact no further business and shall then be dissolved and the assets of the partnership shall be distributed in accordance with their respective capital accounts" (Tr. 1654-1657; Future at 9-10). Spurlock testified that she did not know why the partnership agreement used the different terms "percentage ownership interests" and "respective capital accounts" with respect to the treatment of the distribution of profits and the distribution of assets upon dissolution (Tr. 1654-1657).

160. There is no provision in the Partnership Agreement restricting the limited partners from communicating with the General Partner on matters pertaining to the day-to-day affairs of the Partnership, and the General Partner *must* meet with the limited partners upon the written request of the holders of at least 15 percent of the limited partnership interests. *Id.* at 11. There is no provision in the Partnership Agreement which bars the limited partner from acting as an employee of the limited partnership, as an independent contractor or agent of the limited partnership, or which bars the limited partner from providing services to the partnership.

161. Spurlock testified that she read the limited partnership agreement carefully before she signed it (Tr. 1649). However, Spurlock's first name is misspelled throughout the Agreement (Tr. 1650; Future at 2).

162. Spurlock discussed the FCC Form 301 application with her counsel at Brown & Finn over the telephone (Tr. 1686-1687). Both Spurlock and her counsel had copies of the application in front of them when they spoke. *Id.* Spurlock's counsel asked Spurlock questions from the application and both counsel and Spurlock took notes. *Id.* Brown & Finn then sent Spurlock a typed copy of the application. *Id.* She checked it against the handwritten copy of the application that she had prepared during the prior telephone conversation. *Id.*

163. Spurlock testified that she carefully reviewed the application to make sure it was accurate. *Id.* However, Spurlock's first name was misspelled on the ownership table and elsewhere throughout the application (Tr. 1687-1688). Spurlock's sister's name was also misspelled. *Id.* Spurlock testified that she was sure that she noticed that her name was misspelled but did not remember whether she brought it to her lawyer's attention. *Id.*

164. Denslow provided background information about himself to Brown & Finn for the application (Tr. 1597). He also provided Brown & Finn with financial information to demonstrate that he was financially capable of financing this venture (Tr. 1597). In this regard, he provided Brown & Finn with a financial statement and with references (Tr. 1598). No one provided Spurlock with documents to verify Denslow's and Ridikas' financial qualifications (Tr. 1667-1669). Spurlock relied on counsel's analysis.

165. Spurlock asked Bauguess, Future's engineer, to travel to Richmond and locate a transmitter site for Future. *Id.* Bauguess could not travel to Richmond at that time; he sent Greg Daly, a site consultant, to Richmond to locate the site. *Id.* Daly located the transmitter site at Spurlock's direction (Tr. 1674). Daly then talked to Fine the owner of the site about Future using it for its proposed transmitter (Tr. 1673). Spurlock did not talk to the site owner herself because she "hired the site consultant to come down to handle the specifics of that" (Tr. 1674).

Integration

QUANTITATIVE

166. If Future is awarded the construction permit, Spurlock will devote a minimum of 40 hours per week as General Manager of the station (Future Ex. 2 at 2). As General Manager, she will oversee overall station operations and supervise all aspects of day-to-day operations including, but not limited to, programming, sales and personnel (Future Ex. 2 at 2-3). She will be responsible for the station's EEO program (Future Ex. 2 at 3).

QUALITATIVE

Residency

167. Spurlock has been a resident of Richmond, Virginia since she was born in 1951 (Future Ex. 2 at 1).

Minority and Female Enhancements

168. Spurlock is a Black female (Future Ex. 2 at 1).

Broadcast Experience

169. From 1979 until 1982, Spurlock was an Account Executive with WTVR Radio/WEZS Radio in Richmond, Virginia (Future Ex. 2 at 1). As Account Executive, Spurlock supervised radio station accounts, including the supervision of placement of advertising and collection and credit terms for customers. *Id.* From 1983 until 1984, Spurlock was an Account Executive with WRLH TV 35 in Richmond, Virginia. *Id.* As an Account Executive, Spurlock supervised station accounts, developed territory, and directly sold air time on Richmond's first independent television station. *Id.* In 1986, Spurlock became an Account Executive with WVRN TV 63 in Richmond, Virginia. *Id.* This involved the direct sales of television air

time for what was then a new station. *Id.* Spurlock supervises accounts, including the placement of commercials and collection and credit terms for customers (Future Ex. 2 at 2). From 1984 to the present, Spurlock has also been Co-producer and Co-host of Lock Lane & Co., a television magazine which airs on Continental Cable Vision 31, Storer Cable Vision 6, and on public community access channels on the cable systems serving Richmond, Virginia. *Id.*

Civic Activities

170. Spurlock is a member of the Second Baptist Church and Sanctuary Choir and is a volunteer speaker and performer at various fundraising events in Richmond (Future Ex. 2). Her participation in the Virginia Commonwealth University charity fundraiser, Friends Association fundraiser, and her speech during Black History Month all took place after Future's application was filed (Tr. 1692-1693). The Sanctuary Choir is associated with the Second Baptist Church. The two groups have overlapping membership. Spurlock has been a member of both groups for six years (Tr. 1694).

Diversification

171. Ridikas, a former limited partner of Future, is a 73.1 percent limited partner in Jessup Broadcasting Limited Partnership, which was issued a construction permit for a new FM broadcast station in Hardeeville, South Carolina on July 17, 1987 (Tr. 1555-1556). Denslow is currently employed by Cable Holds, a company which holds various cable television properties and interests (Tr. 1559). Neither Future nor Spurlock have any ownership in any medium of mass communication (Future Ex. 1 at 1; Ex. 2 at 3).

Auxiliary Power

172. Auxiliary power will be utilized to insure continuous inspection in the event of a power outage at either the studio or transmitter site (Future Ex. 3).

Witjo Broadcasting, Inc.

Background

173. Witjo Broadcasting, Inc. (Witjo), is a Virginia corporation issuing 2500 shares of one class of stock (Witjo Ex. 1 at 1). The stock has been subscribed as follows:

Shareholder	Number of Shares
Hardy James Lang	400
Thomas J. Flammia	400
Eric James Cunningham	400
Charles Lessin	400
Israel Teitelbaum	450
Donald Crosby	450

Id. Witjo proposes 64% integration of ownership and full-time management based upon Messrs. Lang, Flammia, Cunningham and Lessin's participation and ownership (Witjo Ex. 3 at 1; Ex. 4 at 1; Ex. 5 at 1; Ex. 6 at 1).

174. Charles Lessin first learned about the proposed station from Israel Teitelbaum who asked him if he was interested in seeking a license (Tr. 1862). By the second meeting between himself and Teitelbaum, Lessin was aware of Donald Crosby's involvement (Tr. 1866). After that meeting, Lessin began to actively seek additional participants in the venture (Tr. 1866). He looked specifically for people in the Richmond area, who had broadcast experience, and members of minority groups (Tr. 1865). Lessin contacted Tom Flammia because of Flammia's broadcast experience and asked him if he would be interested in investing (Tr. 1868-1869, 2007). Flammia then spoke with Eric Cunningham about participating in the application (Tr. 1870, 1972, 2008). Cunningham, in turn, brought in Hardy Lang (Tr. 1871, 2008). It is Lang's recollection, however, that he was first contacted by Flammia (Tr. 1907). Subsequently there was a meeting of all six individuals involved in applying for the FM license (Tr. 1872). The group discussed generally what applying for a license would entail in terms of costs and time (Tr. 1873). At this meeting the group decided to form a corporation and divided the stock ownership (Tr. 1874). The reasons for Teitelbaum and Crosby getting more stock than the others were not discussed (Tr. 1876). Lessin assumed they got more because Teitelbaum initiated the project (Tr. 1876).

175. Lessin stated that the group has an agreement that "if the need arises that we will all contribute more funds to the corporation" (Tr. 1880). The obligation to respond to cash calls continues as long as there is a corporation (Tr. 1884). Messrs. Lang, Flammia, Cunningham and Lessin all understand they are subject to further cash calls (Tr. 1880, 1912, 1976, 2014). However, it was stipulated by Witjo's counsel that no provision for additional cash calls is in the bylaws (Tr. 1976). To Lessin's knowledge, no one has rejected a cash call (Tr. 1904). At the time of his testimony, Lessin had put in an additional $1200 (Tr. 1881). He assumed the other integrated stockholders had also each paid an additional $1200 (Tr. 1882). Lang was aware of the cash call for $1200 but had not paid it yet (Tr. 1913). Although Lessin is the corporate Treasurer, the additional funds were sent to Teitelbaum's trust account. *Id.* Lessin is not authorized to sign a check for more than two thousand dollars without the signature of either Teitelbaum or Crosby (Tr. 1886). Neither Teitelbaum nor Crosby has signed any checks (Tr. 1904). Lang, the corporate president, is not a signatory on the corporate account (Tr. 1924).

176. Legal fees are to be paid by the Corporation (Tr. 1916). The terms of Witjo's legal services retainer agreement with Teitelbaum provides that professional fees will be paid after one of the following events:

(1) The grant of the construction permit to Witjo.

(2) A merger of Witjo's application into any other application on file in the proceeding.

(3) A settlement involving Witjo's application.

(Tr. 1920). If there is a settlement before the professional fees are paid each of the principals of Witjo would receive a $1,500 payment. *Id.*

177. Crosby hired the engineering firm (Tr. 1889, 1928). Lessin assisted in locating the transmitter site by calling a listing agent, getting the specifics on the site, and calling Flammia (Tr. 1888). Cunningham and Flammia drove around to different proposed sites that had been suggested by the engineering consultant (Tr. 1986, 2018). Lessin participated in estimating the costs involved and discussed potential funding with lending institutions (Tr. 1889). Flammia helped estimate the costs involved by speaking with other broadcasters in markets of similar size, but he did not participate in determining whether money would be available (Tr. 2019). Although involved in discussion of costs, Lang exercised no independent efforts to develop cost figures (Tr. 1927).

178. Lessin, as Treasurer, was responsible for certifying whether Witjo was financial qualified or not, although it was Lang, the President, who signed the application (Tr. 1925-1926). Lessin made inquiries and gave Lang reasonable assurances that Witjo was qualified. Lang did not personally look at documents but verified Lessin's contacts with counsel (Tr. 1926, 1969).

Integration

QUANTITATIVE

179. Lang will resign his current position if Witjo's application is granted and will become the General Manager of the station, devoting at least forty hours per week (Witjo Ex. 3 at 1; Tr. 1959). He will be ultimately responsible for all management, administrative and budgetary decisions relating to the operation of the station. *Id.* Lang will not have independent authority to set salaries (Tr. 1929). Instead, the Board of Directors will set salaries. *Id.* He does not know how many employees the station will employ. *Id.*

180. Flammia will serve as the station's Program Director and spend at least forty hours per week managing programming at the station (Witjo Ex. 4 at 1). He does not know how many employees he will supervise because the principals have not yet determined staffing or a format (Tr. 2020-2021).

181. Cunningham proposes to devote at least forty hours per week to the station as Business Manager and Director of Promotions (Witjo Ex. 5 at 1). He will be responsible for the day-to-day management of the business and financial operations of the station and also the preparing and planning of the promotion of the station within the Richmond community. *Id.* Cunningham did not help prepare any budget pertaining to the proposed station and does not even know if one was prepared by someone else (Tr. 2003). He does not know if he will supervise any employees in these roles (Tr. 1988). Cunningham believed that the general manager would be authorized to set salaries and fire employees (Tr. 1989).

182. Lessin will serve as Sales Manager of the station and will devote at least 40 hours per week to the management of the station if Witjo is awarded the construction permit (Witjo Ex. 6 at 1). It has not yet been determined whether there will be employees for him to supervise or whether he will be the only salesperson (Tr. 1891).

183. Lessin will be "responsible for management[,] administrative and budgetary decisions relating to the sale of advertising time and other income-producing activities at the station" (Witjo Ex. 6 at 1). Lang, as the president of the organization, will have the ultimate say (Tr. 1892-1893).

QUALITATIVE

Minority Enhancements

184. Lang and Cunningham are Black males (Witjo Ex. 3 at 1; Witjo Ex. 5 at 1).

Residency

185. Lang currently lives in Midlothian, Virginia, but he will relocate to Richmond, Virginia, if Witjo's application is granted (Witjo Ex. 3 at 1).

186. Flammia currently resides in Reisterstown, Maryland and will relocate to Richmond, Virginia, where he lived for two years, if Witjo is granted the construction permit (Witjo Ex. 4 at 1).

187. Cunningham currently resides in Richmond, Virginia where he has lived for three years (Witjo Ex. 5 at 1).

188. Lessin currently resides in Richmond, Virginia, and he has lived there since he was nine months old except for a five-year period of out-of-state school attendance. (Witjo Ex. 6 at 1-2; Tr. 1894).

Civic Activities

Charles Lessin

189. Lessin has been serving on the Board of Directors of Kneseth Beth Israel Synagogue since early 1987 (Witjo Ex. 6 at 2; Tr. 1894). He has also been involved in fundraising for the Jewish Community Federation of Richmond and a Richmond private, nonprofit school, Rudlin Torah Academy. *Id.* He spends an average of an hour a month on the Federation's activities and approximately five to ten hours a month on the school's activities (Tr. 1895-1896). Lessin also is involved in a nonprofit group called the Jerusalem Connection which provides religious and educational services on an international level (Witjo Ex. 6 at 2). The Jerusalem Connection basically assists people in observing the Jewish Faith: it contributes money to local charities but was not specifically set up to help only those that are underprivileged (Tr. 1900-1901).

Hardy James Lang

190. Lang has been involved in assisting in fundraising for (1) Big Brothers and Big Sisters of Metropolitan Richmond, Inc., (2) a help agency called "7001", and (3) an organization called "Jack and Jill of America" which teaches leadership skills (Witjo Ex. 3 at 1-2). Lang's fundraising for Big Brothers and Big Sisters consisted of being "auctioned off" as a date (Tr. 1941). He testified that his participation was not part of his employment nor at the request of management; however, newspaper accounts of the event mentioned his employer and his employer paid for the date itself (Tr. 1942-1943. Lang has also participated in Bowlathons for Big Brothers/Big Sisters, but he is not a member of the organization (Tr. 1945).

191. Lang serves as an "on-call advisor" to "7001" (Tr. 1948). He has acted as the host of events for the Jack and Jill organization during the two years prior to his testimony (Tr. 1948). Lang does not pay dues to Jack and Jill and is not a member of the organization (Tr. 1951).

192. Lang is on the advisory committee of Branches of the Arts, a group which assists in educating young people about the arts (Witjo Ex. 3 at 2). He has attended the two meetings of the committee (Tr. 1952). One meeting was in 1981, and the other was a few years later. *Id.* Lang has participated in concerts for Branches of the Arts (Tr. 1954). His employer, Station WPLZ, was involved in the event from a promotion standpoint (Tr. 1954).

Eric James Cunningham

193. Cunningham has participated in the Coors Cancer Classic, a Richmond fundraising event (Witjo Ex. 5 at 2; Tr. 2003-2004). He also participated in a fundraising event for Multiple Sclerosis in Richmond (Witjo Ex. 5 at 2).

Thomas Joseph Flammia

194. Flammia was involved with the "Ugly Bartender" fundraiser for the Multiple Sclerosis Society (Tr. 2023). His employer was the official radio station of the event, and the sponsor of the event promoted the event by buying time on his employer's station (Tr. 2024). The employer's station's logo was on paraphernalia associated with the event. *Id.* He also promoted and participated in a March of Dimes Walkathon and an American Cancer Society bike race (Witjo Ex. 4 at 3; Tr. 2027). Flammia doesn't remember if he wore promotional apparel during the Walkathon (Tr. 2028). He was not a member of the March of Dimes or the American Cancer Society (Tr. 2028, 2031). All of Flammia's listed activities for various groups, while not demanded by his employer radio station, had some involvement with his employer (Tr. 2030).

Broadcast Experience

195. Lang is currently an on-air personality at station WPLZ, Richmond, Virginia, and has held that position for the last seven years. He is also the Operations Manager, Program Director and Music Director (Witjo Ex. 3 at 2).

196. Flammia first started in commercial broadcasting in January 1973. He has held various positions as follows:

January 1973 - June 1973	Announcer; WKMB, Sterling, New Jersey
June 1973 - September 1974	Morning Drive and Music Director; WNNJ, Newton, New Jersey
September 1974 - January 1977	Morning Drive and Promotions Directors; WCHV, Charlottesville, Virginia
Approximately January 1977-May 1977	Announcer and Public Service Director; WMJQ, Rochester, New York
September 1977 - April 1983	Program Director and Morning Announcer; WCHV, Charlottesville, Virginia
Approximately April 1983 - October 1984	Program Director; WQDR, Raleigh, North Carolina
Two months	Program Director; KATT, Oklahoma City, Oklahoma
Nineteen months	Program Director; WRXL, Richmond, Virginia
Twenty-two months	Program Director; WIYY, Baltimore, Maryland

(Witjo Ex. 4 at 2).

197. Cunningham currently works at Capital Broadcasting Company (Witjo Ex. 5 at 1). He has held various positions with Capital Broadcasting where he has worked since his graduation in 1984 (Witjo Ex. 5 at 2). These positions include Traffic Director, Promotions and Programming Assistant, Promotions Director, Reporter and Board Operator. *Id.* Cunningham received his degree from Waynesburg College in English Communications which is an English degree with emphasis on the broadcasting communications. *Id.* During college he hosted and promoted a weekly radio show. *Id.*

Diversification

198. None of Witjo's shareholders have any attributable ownership in any medium of mass communication (Witjo Ex. 2).

Auxiliary Power

199. Witjo has proposed installation of an auxiliary power system in the event its application is granted (Witjo Ex. 7).

Penny Drucker

Integration

200. Penny Drucker (Drucker) is an individual applicant who resides in Evergreen, Colorado (Drucker Ex. 1 at 1). She claims no integration credit in this proceeding. *Id.*

Diversification

201. Drucker owns the following construction permits:

(1) A construction permit for a full service broadcast station to operate on Channel 22 at Key West, Florida (Drucker Ex. 2 at 1).

(2) Three construction permits for the following low power television stations:

K51CF	Grand Junction, CO
K34BE	Juneau, AK
K523S	Sante, Fe, NM

Id.

(3) Drucker's husband holds 80 percent of the stock of High Seas Communications Corp., which is the general partner of The Denver Channel 59 Partnership, Ltd., permittee of KUBD, Channel 59, Denver Solorado. *Id.* at 2.

(4) Drucker's husband is a Director, Vice President, and 20 percent stockholder of Echonet Corporation, permittee of:

K28BG	Juneau, AK
K22SF	Austin, TX
K49AY	Cheyenne, WY
K28AG	Birmingham, AL
K54CQ	Fort Collins, CO

Id. at 3. Echonet Corporation also has MMDS construction permits for Casper, Wyoming and for Anchorage, Alaska. *Id.*

Auxiliary Power

202. Penny Drucker proposes to utilize auxiliary power facilities at both her studio and transmitter sites to provide continued service in the event of power disruption (Drucker Ex. 3).

Virginia Communications Limited Partnership

Background

203. The structure of Virginia Communications Limited Partnership (VCLP) is as follows:

L. Patrick Mellon, General Partner, 20 percent equity interest

George G. Beasley, Limited Partner, 80 percent equity interest (VCLP Ex. 1 at 2).

(VCLP Ex. 1 at 2).

204. VCLP filed its application on December 16, 1985. The application originally listed Sam Floyd, an engineer at Beasley Broadcasting, as the sole limited partner (Tr. 2053). At the time of the applicant's formation, no written limited partnership agreement existed (Tr. 2082). The partnership was not formally created until June of 1987 at which time VCLP filed an amendment reporting a change in applicant's name from "Patrick Mellon" to "VCLP" (Tr. 2055, 2057; 2072; 2113; VCLP Ex. 1). Until this point, the applicant had not come to settle upon "the specifics of the structure of the limited partnership . . . " (Tr. 2057). The VCLP application as originally filed did not specify the equity split between the general and limited partners in the applicant (Tr. 2059-2060).

205. A subsequent amendment was filed on July 23, 1987 substituting George G. Beasley for Sam Floyd as the sole limited partner (Tr. 2072). Beasley is the president of Beasley Broadcasting (Tr. 2072-2073). He is an owner of numerous broadcast properties (Tr. 2076-2077). Beasley was Floyd's employer at the time of Floyd's involvement as a limited partner in the applicant (Tr. 2072-2073).

206. Beasley Broadcasting is represented by the same firm that represents VCLP, Baker and Hostetler (Tr. 2054; 2108). Mellon testified that despite the fact that Baker and Hostetler negotiated the Limited Partnership Agreement (the Agreement) between both himself, the general partner, and Beasley, the limited partner, he was comfortable with that arrangement (Tr. 2130).

207. Beasley and Mellon have each paid their initial capital contributions (Tr. 2080). The expenses incurred by the partnership prior to the start-up of the account for the limited partnership were absorbed by Mellon (Tr. 2081). The engineer used for this application was recommended by Jack Whitley of Baker and Hostetler (Tr. 2116). Mellon is not aware whether the engineer, Mullaney, does work also for Beasley Broadcasting (Tr. 2116). Beasley does not receive copies of the partnership's bills (Tr. 2116). Mellon has not discussed with Beasley whether Beasley has lines of credit or established relationships with banks that do broadcast lending (Tr. 2118). Mellon does not expect to utilize Beasley's connections in obtaining financing for the construction of the station (Tr. 2118). Beasley has not guaranteed any loans on Mellon's behalf (Tr. 2120). It has never been suggested or implied that Beasley's staff would be made available to VCLP in the areas of engineering, programming, or legal affairs (Tr. 2121). Mellon would not seek Beasley's advice on implementing policies with respect to VCLP (Tr. 2133).

208. Pursuant to the terms of the "Agreement of Limited Partnership," additional General Partners can only be added upon the unanimous vote of all partners (VCLP Ex. 1 at 8). The General Partner has full, exclusive, and complete authority and discretion in the management and control of the Partnership. *Id.* at 10. The General Partner has the specific power to manage the assets of the Partnership. *Id.* at 11. The General Partner is not permitted to communicate, or attempt to communicate, with the Limited Partner on matters pertaining to the day-to-day affairs of the Partnership's business. *Id.* at 13. It is Mellon's understanding that this provision also serves as a bar preventing the Limited Partner from participating in the long-range planning for the station (Tr. 2089). The Limited Partner cannot take part in the management or operation of the business, transact any business for the partnership, nor act as an employee, independent contractor, or agent of the limited partnership if his functions relate directly or indirectly to the media enterprises of the partnership (VCLP Ex. 1 at 13). It is Mellon's understanding that this provision also prevents Beasley Broadcasting from participating in the management and operation of the station (Tr. 2088, 2106). While the Limited Partner ordinarily has no right to remove any General Partner, the General Partner can be removed (1) for any act of malfeasance, criminal conduct, or wanton or willful neglect as determined by a court or an arbitrator; (2) upon being adjudicated incompetent by a court of competent jurisdiction; or (3) upon being subject to bankruptcy proceeding, as described in Section 402(4)-(5) of the Revised Limited Partnership Act (VCLP Ex. 1 at 16). The Limited Partner may not provide any service to the partnership, with the exception of loaning money or acting as surety for the partnership. *Id.* at 14.

209. Mellon is free to withdraw as General Partner at any time (Tr. 2096). Thereupon the limited partner is empowered by the Agreement to elect a new General partner. The former General Partner, Mellon, may retain his 20% equity interest as limited partner in an event such as his withdrawal as general partner (Tr. 2094).

210. Under Section 13 of the Agreement, there is a provision for a reciprocal first right of refusal (Tr. 2100). Mellon, as general partner, is required to first offer the sale of his general partnership interest to the limited

partner (Tr. 2100). There is a nine month notice period in which Mellon must wait before selling his general partnership interest to a third party (Tr. 2101).

Integration

QUANTITATIVE

211. Mellon proposes to serve full-time as General Manager of the proposed station (VCLP Ex. 2 at 2). He will work a minimum of 40 hours per week in that position. *Id.* The position will continue indefinitely (Tr. 2135). Upon the grant of VCLP's application and commencement of operations by VCLP on Channel 266A, he will terminate his current employment as Director of Programming for TeleCable Corporation, in order to effectuate that commitment (VCLP Ex. 2 at 2).

212. As General Manager, he will oversee the construction and operation of VCLP's station and will direct its overall operations. *Id.* He will hire department heads and oversee the hiring of all other key station personnel. *Id.* He will be responsible for the administration of the station's EEO Program. *Id.* The programming, administrative, and promotional components of the station's operations will be under his supervision. *Id.* The ultimate decisions in station operations will be made by him in consultation with the respective department heads. *Id.* at 2-3.

QUALITATIVE

Residency

213. Mellon was born in New York City and currently resides in Norfolk, Virginia. Upon grant of VCLP's application, Mellon will relocate his residence to Richmond, Virginia (VCLP Ex. 2 at 3).

Minority Enhancement

214. Mellon is a Black male (VCLP Ex. 2 at 3).

Broadcast Experience

215. Since 1983, Mellon has been employed as the Director of Programming of TeleCable Corporation in Norfolk, Virginia. In that position, he is responsible for the long-term programming strategy and planning, the legal and business issues associated with program supplier contract negotiation, drafting and administration, the programming expense budgeting, and the product distribution and channel allocation determinations. From 1983 to 1984, he was TeleCable Corporation's Programming Manager. *Id.*

Diversification

216. Mellon owns 3,500 shares of TeleCable Corporation, which he will divest if VCLP's application is granted (VCLP Ex. 2 at 6). VCLP does not hold any interest in any medium of mass communications (VCLP Ex. 1 at 2).

Auxiliary Power

217. Virginia Communications Limited Partnership will install emergency power generating equipment at its main studio and transmitter to allow for uninterrupted operation by the station in the event of power outages (VCLP Ex. 2 at 6).

QUALIFICATIONS ISSUES

Air Hazard Issue

James River

218. James River has received from the FAA a Determination of No Hazard with respect to its proposed transmitter site. *See,* James River Ex. 14.

GRR

219. GRR has received from the FAA a determination of no hazard with respect to its proposed transmitter site. *See* Attachment 1 to GRR's Proposed Findings filed July 20, 1988.

GRR Financial Misrepresentation/Qualification Issues

220. Alfred Smith, GRR's sole general partner, signed its application and certified to its financial qualifications (Tr. 2272). Before signing the application Smith had a meeting with one of GRR's limited partners at the office of GRR's FCC counsel. Smith is uncertain whether the one limited partner present was David Williams or John Boyle (Tr. 2273, 2299). He has never met or spoken with the other limited partner (Tr. 2302). At the meeting the partners and the attorney talked generally about the application and about the associated costs (Tr. 2299-2300). Smith was satisfied that the limited partners would be able to meet the obligation based on "the shrug of the shoulder and the nod of the head" of one limited partner during the course of the conversation (Tr. 2300). He was also assured by Alan Burns, the third limited partner, that Burns would be able to meet his own obligations. However, it is not clear wheher that exchange occurred before or after the application was filed (Tr. 2302).

221. Smith has never seen the balance sheets or financial statements of the limited partners, and at the time of the hearing he had never had discussions concerning the partnership with anyone who had ever seen the limited partners' balance sheets (Tr. 2275, 2280, 2318). He never talked with Williams about his ability to finance the station, but he did make inquiries of several people concerning Williams' reputation (Tr. 685-687, 2321). He did not make inquiries with his contacts about Boyle's background before signing the application (Tr. 687). He has never had any correspondence whatsoever with Boyle (Tr. 673). Rather, he relied on Williams' assurances that Boyle would uphold his obligation to pay his percentage of the partnership's expenses (Tr. 672). Smith testified that he did not know whether Boyle would meet his obligation to the partnership (Tr. 674). He relied only on verbal assurance that Burns and Williams would be able to satisfy their combined 90% equity obligations in the venture (Tr. 700-701, 703-704).

222. Smith never produced any documentation of his own finances, but did discuss his assets with the partnership's counsel (Tr. 700). He decided that he could meet his 10% obligation, but did not discuss with the other partners what would happen if he were unable to pay his share (Tr. 683-684). He did discuss with the limited partners the possibility of default by one of the partners, and he believes that in that contingency GRR would have to find new partners or additional funds to meet its obligations (Tr. 683-684). He has never talked to any banks or other financial institutions about a loan for the partnership (Tr. 2293).

223. At the time that he signed the application, Smith had not written down the estimated costs of building the proposed station, and, as late as the hearing, still has not done so (Tr. 2273-2274). He testified that at the initial pre-filing meeting with the single GRR limited partner, an estimated figure of $300,000 to $350,000 was mentioned; however, no figures were committed to writing and no notes were kept (Tr. 2281). When those estimates were made, the partners did not know how much it would cost to buy or lease a transmitter site or to build or lease the studio site, and Boyle and Williams had not discussed the ultimate costs with each other (Tr. 2282; BBG Ex. 5 at 6). Boyle assumed, from talking to a radio consultant, that it might cost in the neighborhood of "seven figures;" he did not discuss the amount with Williams (BBG Ex. 5 at 6). Other than at the initial meeting, the general partner never discussed with the limited partners how much it would cost to build the station and has not discussed salary expenses at all (Tr. 642; 652). In certifying financial ability, Smith relied on "ball-park figures" that were not committed to paper (Tr. 702-703).

224. The GRR Amended Agreement of Limited Partnership (the Agreement) does not contain any provision that purports to require the limited partners to contribute any funds to the partnership beyond their original capital contributions (BBG Ex. 6). The "amended" Agreement is apparently the only one in existence (Tr. 607, 656, 682, 705). The agreement does require the general partner to contribute necessary additional capital to the partnership in pro-rata amounts equal to his partnership interest (BBG Ex. 6 at 3). The agreement also provides that, if proceeds from the operation are insufficient to meet expenses, the general partner may loan money to the partnership (BBG Ex. 6 at 4).

225. Smith believes that each partner is responsible for providing necessary funds to the partnership in proportion to his ownership interest (Tr. 2275-2276, 2283-2284). However, he is not sure whether any provision in the amended agreement requires the limited partners to invest any additional money (Tr. 2287). Smith believes that he is capable of paying for 10% of the partnership's expense (Tr. 683-684).

226. Burns, who has a 40% interest in the partnership, never paid any money into the partnership (Tr. 2306). His understanding is that Williams and Boyle are to fund the entire venture (Tr. 2307-2308). Even though he believes that, under the partnership agreement he could be required to contribute funds, he has a verbal agreement to the contrary (Tr. 2314). He has never discussed this verbal agreement with the general partner (Tr. 2307, 2316).

227. Williams and Boyle are partners in Cellar Door Productions, a concert promotions company (Tr. 2318-2319). Williams understood from the beginning that it was his and Boyle's obligation to fund the partnership, and that neither Smith nor Burns would have to make any financial contributions (Tr. 2320, 2324-2325). Williams believes that the amended partnership agreement provides that each partner pays in accordance with his partnership percentage, but disputes that that reflects the actual agreement (Tr. 2327).

228. Boyle testified that it was his understanding that he would "fund" the proposed station "with other people," and that "whoever had [money] would put it in" (BBG Ex. 5 at 3). He believes that all of the partners are supposed to contribute money, although he expected that he would be responsible for most of the money (BBG EX. 4 at 1-2; BBG Ex. 5 at 4). He does not know whether Burns has an obligation to contribute funds (BBG Ex. 5 at 3). He also does not know whether there are any provisions for future capital calls or requests for funds, but thinks that he and Williams would put in additional capital if it were needed (BBG Ex. 4 at 2). He has guessed that he and Williams might have contributed "up to the seven figures," but has not discussed that amount with his partner (BBG Ex. 5 at 6).

229. As of March 1, 1986, Boyle's Statement of Financial Condition was as follows:

ASSETS	
Cash	$ 30,000
Money market account	10,000
Notes receivable	203,000
Purchase deposit	5,000
Investments	
Partnerships	182,000
Closely-held corporations	3,230,000
Real estate	625,000
Marketable securities	14,000
Retirement plans	336,000
Individual retirement accounts	10,000
Residence	700,000
Personal Property and furnishings (at nominal value)	1,000
TOTAL ASSETS	**$5,346,000**
LIABILITIES AND NET WORTH	
LIABILITIES	
Accounts payable	$ 1,000
Notes payable	32,000
Notes payable for partnership interests	78,000
Real estate mortgage payable	146,000
TOTAL LIABILITIES	$ 257,000
NET WORTH	**5,089,000**
TOTAL LIABILITIES AND NET WORTH	**$5,346,000**

(GRR Ex. 8 at 5). The "notes receivable" consist of: (1) a note pursuant to which a monthly payment is made of $1,253, with the last payment due July 1989; (2) a $10,000 note to Kenneth MacDonald; (3) a demand note for $75,000; and (4) a $46,000 note, of which $46,000 is due on each December 31. *Id.* at 6. The "investments in partnerships" consist of investments in real estate partnerships and Comcast Cable Television. *Id.* at 7. The investments in closely-held corporations consist of his investment in the Cellar Door group of companies. *Id.* at 8. The value of the investment was determined by Boyle using a multiple of four. *Id.* at 8. The figures for Boyle's

real estate investments are based upon sales of similar properties in similar circumstances as determined by him. *Id.* at 9. The estimated current value of the residence is said to be comparable to sales prices of similar properties as determined by Boyle. *Id.* at 10.

230. As of March 1, 1988, Boyle's Statement of Financial Condition was as follows:

ASSETS	
Cash	$ 335,000
Notes receivable	229,083
Purchase deposit, office units, Alexandra, VA	25,000
Investments:	
Partnerships	133,000
Closely held corporations	6,092,000
Real estate	990,000
Marketable securities	338,912
Individual retirement accounts	480,000
Residence	700,000
Personalty	1,000
	$9,323,995
LIABILITIES	
Accounts payable	$ 1,000
Notes payable - Limited partnerships - Note 10	21,600
Real estate mortgages - Note 10	300,185
Contingent liabilities - Note + +	
	$322,785
NET WORTH	**$9,001,210**
	$9,323,995

(GRR Ex. 8 at 16). The notes receivable consists of: (1) a note in the amount of $19,583, with monthly payments due of $1,253 due monthly; (2) $75,000 due on demand; (3) a note in the amount $34,500 of which $11,500 is due annually; (4) a note in the amount of $40,000 which is not due until December 19, 1991; (5) a note in the amount of $42,000, of which payments of $567 are due monthly; and (6) a note in the amount of $18,000 which is due on October 1, 1991. The estimated current value of Boyle's investments in partnerships is their cost basis (GRR Ex. 8 at 17). The stated values for the closely-held corporations was determined by Boyle, based upon projected future earnings of the companies (GRR Ex. 8 at 18). The real estate estimates have been valued at an amount that approximates market, with the exception of the $340,000 office building, which was recorded at cost (GRR Ex. 8 at 20). The residence is valued at an amount that approximates current market value (GRR Ex. 8 at 21).

231. David Williams' Statement of Financial Condition as of February 20, 1985 was follows:

ASSETS	
Cash	$ 10,000
IRA	26,000
Marketable securities	33,880
Closely-held corporations	762,000
Limited Partnership	12,000
Real estate held	
Residence	225,000
Resort condominium	92,000
Retirement Trust	100,000
Personal effects (at nominal value)	1,000
Investment Condo	85,000
LIABILITIES AND NET WORTH	
LIABILITIES	
Accounts payable	$ 3,000
Accrued interest - notes payable - GMC Retirement Trust	18,169
Notes payable	55,000
Mortgages payable	
Residence	73,000
Resort condominium	38,000
Investment condo	65,000

(GRR Ex. 9 at 5). The investments in closely-held corporation is based upon the estimated potential sales price of the businesses as determined by Williams (GRR Ex. 9 at 6). The current estimated values of the residence and resort condominium are based on similar properties in similar circumstances as determined by Williams (GRR Ex. 9 at 8).

232. David Williams' "Statement of Assets & Liabilities" as of January 5, 1988 was as follows:

ASSET	
Cash	$ 22,000
Investments	
Marketable securities	66,482
Closely-held corporations	1,300,000
Limited partnership	12,000
Real estate	171,900
Individual retirement accounts	93,922
Note receivable	46,000
Residence	225,000
Personal property	75,000
TOTAL ASSETS	**$2,012,304**

LIABILITIES	
Mortgages payable	176,000
Accounts payable	3,000
Total Liabilities	179,000
NET WORTH	**1,833,304**
	$2,012,304

(GRR Ex. 9 at 11). The estimated current value of his closely-held corporations is based upon the projected future earnings of the businesses (GRR Ex. 9 at 13). The real estate is valued at an amount that approximates market value (GRR Ex. 9 at 13).

VCLP Abuse of Process Issue

233. VCLP has been represented in this proceeding by the law firm of Baker & Hostetler (B&H); primary day-to-day responsibility for VCLP's representation was assigned in early October 1986 to Dan J. Alpert (Alpert), an associate and an experienced communications attorney (VCLP Ex. 4, pp. 1-2; VCLP Ex. 5, pp. 1-2). At that time, Alpert undertook a review and investigation of pending applications which were mutually exclusive with VCLP's (VCLP Ex. 5, p. 2). Among other things, during mid-October, 1986, Alpert contacted the relevant individuals identified in each application to attempt to verify if each applicant had obtained "reasonable assurance" of the availability of its designated transmitter site (VCLP Ex. 5, p. 2; Tr. 2402).

234. Upon discovering that two Richmond FM applicants, Radio Richmond Limited Partnership (Radio Richmond) and Future Broadcast Limited Partnership (Future), specified the same land as transmitter sites, Alpert contacted the site owner, Allen B. Fine (Tr. 2369; VCLP Ex. 5 at 3). The contact was by phone and occurred on October 14, 1986 (VCLP Ex. 5 at 3). Alpert asked Fine whether he had been contacted concerning the availability of his land for use as a site and what assurances, information or discussions, if any, he had with Future (Tr. 2370). Alpert did not state that he was representing a client interested in leasing the land; however, the record testimony does not reveal that he identified himself as the legal representative of an applicant in competition with Future (VCLP Ex. 5 at 3). Rather, his direct case testimony is that he identified himself as "an attorney in Washington, D.C." (VCLP Ex. 5 at 4). Fine apparently believed that Alpert contacted him because he or VCLP was interested in purchasing or leasing the land (Tr. 2467; VCLP EX. 6 AT 33-35).

235. Following the conversation, Alpert drafted a declaration summarizing the information that had been imparted to him by Fine (Tr. 2370). That declaration, in pertinent part, read as follows:

> I [Allen Fine] was contacted by Greg Daley in December 1985 . . . . I was told by Mr. Daley that he represents a party who was seeking to learn of the availability of land in the Richmond area to construct a tower for an FM antenna and transmitter. Although I own a large piece of land in Richmond and indicated I would be willing to consider giving permission for that project, no commitment for the sale or lease of my land was ever entered into.

(VCLP Ex. 5 Attachment A at 2).

After drafting the declaration, Alpert then called Fine and read him the draft. Fine agreed that it accurately reflected his earlier conversation (VCLP Ex. 5 at 5).

236. Alpert then had a copy of the declaration mailed by Federal Express to Fine (VCLP Ex. 5 at 5). Fine returned a declaration to VCLP's representative on October 21, 1986 (VCLP Ex. 5 at 6). The declaration had been retyped by Fine and had been changed in the following respects only: (1) in the first paragraph "Isabel T. Fine" was substituted for the personal pronoun "I"; the personal pronoun had been in exclusive reference to Fine; (2) in the second and third paragraphs the personal pronoun "I" was throughout changed to "we" and verb tenses were also appropriately adjusted to the plural form; (3) and at the bottom of the one page declaration a signature line was added for Isabel T. Fine (VCLP Ex. 5, Attachment B at 1; Tr. 2437).

237. The envelope from Fine contained three documents in addition to the signed and dated declaration (Tr. 2370; VCLP Ex. 5, Attachments B and C). One document was a letter dated December 13, 1985 from "Gregory B. Daley" to Mr. and Mrs. Fine. The letter provided that "[a]s per agreement," Daley was "now informing" Fine "that [his] site is being used by two applicants for a FM radio station for Richmond, Virginia." The letter noted that "[c]opies of the assigning documents [were] enclosed complete with the applicants names and address" (VCLP Ex. 5, Attachment C at 1). The second document was entitled "Site Assignment Letter," pertaining to General State Alexander (VCLP Ex. 5, Attachment C at 2). The third document was another "Site Assignment Letter" pertaining to Sheila Spurlock (VCLP Ex. 5, Attachment C at 3).

238. At the very top center of the third document is a business legend: "Telecommunications Site Acquisitions, Inc." The document itself provides that it is "to serve notice" that "Telecommunications Site Acquisitions, Inc . . . . has the right to assign, for the purposes of constructing a FM radio transmitter facility, a letter of intent for the following site . . . " (VCLP Ex. 5, Attachment C at 3). It then specifies the Future transmitter site location (VCLP Ex. 5, Attachment C at 3). The document indicates that the "right of assignment was granted by the owner['s agent] of the above mentioned land . . . on December 6, 1985... to TELSA, Inc." (VCLP Ex. 5, Attachment C at 3). The document also provides that " . . . TELSA, Inc. hereby grants, assigns, conveys and transfers the attached letter-of-intent to the following applicant on a non-exclusive basis . . . ." It then specifies the name of the Future general partner, Sheila Spurlock, and her address (VCLP Ex. 5, Attachment C at 3). The document is signed by "Gregory B. Daly" of "Telecommunications Site Acquisitions, Inc." (VCLP Ex. 5, Attachment C at 3).

239. Following his receipt of the above-described documents and on the date of receipt, Alpert sent to Fine a letter (VCLP Ex. 5, Attachment D). In the letter, Alpert informed Fine that he had "received the Declaration..."

(VCLP Ex. 5, Attachment D). Alpert made specific reference to the "site of assignment letter" attached to the declaration:

> I noticed that in the "site of assignment letter" that you photocopied and sent to may office, it refers to the fact that Grady [sic: Greg Daley] is assigning a "letter-of- intent" for your site. To your knowledge, was such a letter-of-intent entered into by you? If so, if it is convenient, I would greatly appreciate it if you could send a copy of the letter to me. If not, a brief note to me from you would be helpful.

(VCLP Ex. 5, Attachment D).

Fine never sent to Alpert any additional documents and Alpert did not contact Fine between October 21, 1986 and the time Alpert filed the VCLP Motion to Enlarge, October 20, 1987, discussed below (Tr. 2373, 2399). In a subsequent, unrelated telephone call to Daly, Alpert did not ask Daly about the letter-of-intent referenced in VCLP Ex. 5, Attachment D (Tr. 2376). A copy of Alpert's October 21st letter to Fine was placed in the chronological correspondence file maintained by B&H in connection with the VCLP matter (VCLP Ex. 5, pp. 7-8; Tr. 2389).

240. Alpert stated he contacted Fine in October 1986 because he was then thinking of filing a petition to deny against certain applicants on the ground that they had not established the availability of their proposed sites. He decided, however, based on his review of Commission precedent, that a site availability question was more appropriately raised in a motion to enlarge following designation of the applications for hearing (Tr. 2387). At that point, he abandoned the project and placed Fine's declaration in a working folder (Tr. 2388). The site assignment letters and Daly's letter to Fine confirming that per agreement, the site is being used by two applicants for an FM radio station in Richmond, Virginia (VCLP Ex. 5, Attachment C) were also placed in the working file (Tr. 2389). They were not, however, attached to Fine's declaration (Tr. 2420). Alpert's letter to Fine, inquiring as to Fine's execution of a letter-of-intent (VCLP Ex. 5, Attachment D) was placed in a separate correspondence file (Tr. 2386). Alpert states that in the intervening period between his letter of October 21, 1986 and the filing of VCLP's motion to enlarge against Future on October 20, 1987, he forgot that he had requested additional information from Fine (Tr. 2388).

241. VCLP's motion to enlarge sought the addition of issues to determine (a) whether Future currently possesses "reasonable assurance" that its transmitter/antenna site will be available; (b) whether Future ever possessed "reasonable assurance" that its originally designated transmitter/antenna site would be available; (c) whether Future's proposed budget was reasonable; and (d) whether Future had made misrepresentations to the Commission in certifying its financial qualifications. The only document submitted with VCLP's motion to enlarge was the October 20, 1986 Fine declaration. VCLP's motion did not include a copy of Daly's letter to Fine or the site availability letter signed by Daly assigning use of the Fine site to Future's principal or make reference to existence of such documents. Further, VLCP's motion made no mention of a "letter-of-intent" executed by Fine, the subject of Alpert's October 21, 1986 letter to Fine. On the basis of Fine's declaration and in the absence of an opposition by Future, the issues requested by VCLP were added. *See MO & O*, FCC 88M-533, released February 26, 1988.[9] The abuse of process issue added against VCLP concerns VCLP's failure to include or make reference to the documents described *above* in seeking the addition of issues against Future.

242. Alpert assigned preparation of the motion to enlarge to Robert Knopf (Knopf), a new associate at Alpert's firm (VCLP Ex. 5, p. 10: Tr. 2390, 2420). Alpert edited the motion drafted by Knopf (Tr. 2390). Alpert states he pulled out all the declarations received concerning the Richmond proceeding and gave them to Knopf and asked him to go through the various applications (Tr. 2423). He claims that although the subject documents were in the working file, described by Alpert as a large folder of material, he had forgotten about them and did not review these documents at the time the motion was prepared. The only document Alpert recalled receiving was Fine's declaration (Tr. 2421). According to Alpert, it was not until Future's opposition was received that his memory was refreshed as to the existence of such documents [10] (Tr. 2390-2392). He states he then called Knopf who found the documents in the working file. Alpert states he then also remembered his October 21, 1986 letter to Fine inquiring whether Fine had signed a letter-of-intent (Tr. 2425, 2427). Neither VCLP's Opposition To Motion To Strike filed May 7, 1988, which was prepared by Alpert and included his declaration, nor Alpert's written testimony (VCLP Ex. 5) asserted that Alpert had forgotten about the documents received from Fine and his letter to Fine at the time of VCLP's filing of the motion to enlarge issues against Future (Tr. 2432).[11]

243. L. Patrick Mellon, the general partner of VCLP, gave Alpert authority to pursue issue enlargement against competing applicants (Tr. 2354-2355). Mellon held general strategy discussions with Alpert but the merits of a specific motion were not discussed (Tr. 2632, 2363, 2378). Mellon did not discuss with Alpert or see the motion to enlarge against Future prior to its filing and was not aware that such motion was to be filed (Tr. 2363-2364). Alpert's law firm routinely forwarded to Mellon copies of all pleadings filed on his behalf in this proceeding (Tr. 2353, 2378). Mellon specifically recalls receiving a copy of the motion to enlarge issues against Future (Tr. 2353). He reviewed the pleading but did not discuss its contents with Alpert (Tr. 2366). Mellon has never communicated with Fine or Daly concerning Future's application or the availability of its proposed antenna site. Mellon has no independent knowledge concerning the Future antenna site other than what has appeared in the FCC pleadings he has received (VCLP Ex. 7).

CONCLUSIONS

Qualification Issues

Air Hazard Issue

244. James River and GRR have submitted evidence of an FAA Determination of No Hazard with regard to their respective proposed antenna sites. The air hazard issue designated against them is resolved in their favor.

GRR Financial Misrepresentation/ Qualification Issues

245. GRR's general partner, Alfred Smith, certified that "sufficient net liquid assets [were] on hand or [were] available from committed sources to construct and operate the proposed facilities" and that a "reasonable assurance exists that all [funding] sources . . . have sufficient funds to meet these commitments" (FCC Form 301). GRR's certification was false. The record makes clear that Smith could not have known whether GRR was financially qualified when he signed the financial certification since neither he or any other GRR principal had made a serious effort to ascertain predictable costs of construction and initial operation of the proposed station. At the time Smith signed the certification, he had not written down any estimates of building costs. He had heard the figure of $300,000 to $350,000 mentioned at a pre-filing meeting with GRR's attorney but never wrote any figures down or even kept any notes. Moreover, when the "ball-park" figure was mentioned, the partners did not even know what it would cost to buy or lease a transmitter and a studio site. Also, no consideration had been given to salary expenses or, for that matter, any other item of expense. Clearly essential to a truthful certification is for the applicant to be aware of how much money will be reasonably required to build and operate the station for three months.

246. Knowledge that funds are available to meet costs is also a necessary condition for a truthful financial certification. When Smith signed the application, he had no concrete or documentary evidence whatsoever of the ability of his partners to provide the necessary money, even assuming the adequacy of GRR's "ball-park" estimate. No balance sheets or financial statements of any of the limited partners were provided to him. A "shrug" and an affirmative "nod of the head" by one of the limited partners was, in fact, the basis of his certification that there were sufficient funds to meet construction and operation costs.

247. The third prong of a truthful certification is the existence of a commitment to provide the necessary financial support. There is no evidence of such commitment. None of the partners recalls any agreement before the October, 1987 "'Amended' Agreement of Limited Partnership". Even the October, 1987 Agreement does not require any limited partner to make any further contribution to the partnership. In sum, the record reflects that when Smith certified that GRR was financially qualified, GRR had not obtained any reliable construction and operating cost estimates and had made no serious effort to substantiate the availability of sufficient funds. GRR's callous disregard for the integrity of the Commission's processes requires its disqualification, *Washoe Shoshone Broadcasting*, 3 FCC Rcd. 3948 (Rev. Bd. 1988); *see also Port Huron Family Radio, Inc.*, 4 FCC Rcd. 2532 (Rev. Bd. 1989).

248. The record also requires the conclusion that GRR is not currently financially qualified to construct and operate its proposed station. Even as late as the hearing itself, the oral testimony reveals that each GRR principal has a different view of who is duty-bound to pay for applicant costs. Smith believed that each partner was responsible for his pro rata share of expenses. Boyle believed that all of the partners would contribute, but was unclear as to what partner owed what amount. Burns, who holds 40% of the partnership, never contributed any money and never expected to, any written agreements notwithstanding. Williams never expected either Burns or Smith to contribute any funds to the partnership and though himself responsible for costs. Further, the agreement that currently governs the rights and obligations of the partners requires only the general partner to contribute additional funds, and then only a pro-rata ten percent share. The document does not provide for any capital calls against the limited partners. Therefore, the partnership only has assurance that ten percent of its expenses will be met, and even that assumes that Smith, who has presented no evidence of his own wherewithal, can make such payments. The mere fact that in the past two of the limited partners may have provided funding, absent a specific obligation to do so in the future, is not demonstrative of the applicant's current financial qualifications. Furthermore, GRR still has taken no steps to determine how much it cost to put its station on the air. Thus, even at the time of hearing, GRR continued to lack both the knowledge of how much money would be needed, and the proof of a committed source of financing to meet costs. GRR's failure to demonstrate it is financially qualified provides a separate independent basis for its disqualfication.

VCLP Abuse of Process Issue

249. The specified issue is designed to determine if VCLP abused the Commission's processes by withholding information pertaining to its motion to enlarge issues. The record evidence establishes that probative matter, in the possession of VCLP's counsel, was not provided in VCLP's motion. The facts reveal that VCLP's counsel had in his possession at the time of the filing of the motion on October 21, 1986 not only a copy of Fine's declaration but also a document entitled "Site Assignment Letter" and a letter from Daly to Fine, dated December 13, 1985. The declaration itself had been reduced to writing by VCLP's counsel. It stated that although Mr. and Mrs. Fine "own a large piece of land in Richmond" and "would be willing *to consider* giving *permission* " to Future to use the land, "no commitment for the sale or lease of my land was ever entered into." Of critical importance is that although the Site Assignment Letter on its face and the December 13, 1985 letter from Daly to Fine on its face each indicate that permission to *use* the site had in fact been granted, the Declaration drafted by VCLP's counsel does not at all reveal this. Indeed, it suggests that although the site owner was "willing to consider giving permission" for applicant site specification, no such actual permission had been given.

250. The Site Assignment Letter and the December 13, 1985 letter identify the following material terms: (1) site location; (2) permission to specify the site in the Future application; and (3) the existence of some further underlying agreement contained in a "letter of intent." None of these terms are identified in the declaration drafted by VCLP's counsel. Because of VCLP's failure to submit or even identify the documents accompanying the Fine declaration, the Presiding Judge was led to the erroneous conclusion that Future had taken no material steps toward establishing reasonable assurance. As a consequence, basic qualifying issues including a false certification issue were added against Future. Contrary to VCLP's assertion, the purposeful non-disclosure of probative facts and circumstances that would tend to exonerate Future constitute an abuse of the Commission's processes.

251. The dispositive question is whether the non-disclosure was intentional or inadvertent. Only an intentional non-disclosure would warrant a finding of an abuse of the Commission's processes. Prior to the hearing itself, the available evidence indicated that the non-disclosure was intentional. It was for that reason that an abuse of process issue was added. VCLP's Opposition To Motion To Strike filed May 7, 1988, prepared by Alpert and which included his declaration, did not claim as a defense that Alpert had forgotten about the Site Assignment Letter and his letter to Fine at the time of the filing of the motion to enlarge issues. Also, Alpert's written testimony made no such claim. It was only under questioning by the Presiding Judge at the hearing that this defense was first raised. Under these circumstances, VCLP's last minute claim that the non-disclosure was inadvertent, not deliberate, must be viewed with some skepticism. However, VCLP will be given the benefit of the doubt and its last minute defense of inadvertent non-disclosure will be credited. In any event, it is clear that Mellon, VCLP's principal, did not know of and did not acquiesce in its attorney's conduct. Under the circumstances, disqualification of VCLP is not warranted.

Comparative Issue

Diversification

252. The following applicants have no attributable media interests: WKIE, GRR, Bertram, James River, Future, Witjo and VCLP. Weyburn purports to have no attributable media interests. However, in light of the conclusions, *infra*, as to the lack of insulation for Weyburn's general partner and the controlling influence of Weyburn's limited partner, the limited partner's media interests must be considered. These substantial media interests detailed in paragraph 17, *supra*, warrant the assessment of a moderate to substantial diversification demerit. Benns is the 86% shareholder of James River Broadcasting Corporation, the licensee of AM station WZAM, Norfolk, Virginia. Due to the relative proximity of Norfolk to Richmond, Benns must be assessed a slight to moderate diversification demerit. *See Phoenix Media Corp.*, 2 FCC Rcd. 498, 499 (1987). Drucker's media interests, detailed in paragraph 201, *supra*, which are not proximate to Richmond, also warrant imposition of a slight to moderate diversification demerit.

Best Practicable Service

Integration

253. Weyburn receives no quantitative integration credit. Weyburn is a "sham" application. Eunice Wilder, Weyburn's putative general partner, is a "figurehead." The inescapable conclusion reached through a reading of the record is that Sheridan, the limited partner, and its agents, have been the dominant moving force behind the application and will continue to play the dominant role if Weyburn's application were granted. The record establishes that Sheridan's president, Davenport, and his company's consultant, Walk, have undertaken every significant action in the formation and prosecution of Weyburn's application. Among other things, Davenport and Walk identified the Richmond channel and determined the costs of application prosecution, station construction, and first three months of station operation; they did so before ever contacting Wilder. Davenport and Walk selected Wilder (an individual with no past broadcast experience of any kind and one with whom Davenport had no previous business relationship) to be Weyburn's general partner. Davenport and Walk identified the applicant's FCC counsel, selected the applicant's limited partnership form, chose Wilder's equity interest in the applicant (a decision to which she offered no opinion) and chose her prospective salary as general manager (another decision to which she offered no opinion). Walk located the Weyburn transmitter site and contacted Weyburn's radio engineer (with whom Wilder never spoke). Unlike *Victory Media, Inc.*, 3 FCC Rcd. 2073 (1988), the record is devoid of any indication that Wilder exercised any "independent business judgment."

254. Further, Wilder has no financial stake whatsover in the applicant to support her equity interest. Indeed, Wilder has forthrightly testified that she has no money to invest, has made no financial contribution, and is not required to make any such contribution under the Weyburn partnership agreement. Under the Weyburn partnership agreement, Wilder is not liable for partnership costs or losses. It is an established principal of communications law that financial dominance is a strong factor in determining *de facto* control. *See, e.g., KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984); *see, also, WLOX Broadcasting Co. v. FCC*, 260 F.2d 712 (1958). Absent any tangible ownership investment to match her 30% equity interest, Wilder provides no basis for which the Commission may confidently provide her any integration credit whatsoever. Moreover, the source of financing for the applicant, its corporate limited partner, is required by the partnership agreement to make only one certain financial contribution -- $10,000. The remainder of financing is to be supplied by loans. However, these loans have no interest, repayment or security terms. In hearing testimony, the president of the corporate limited partner has explained that he will continue to pay for costs if they are "reasonable." In the presence of a partnership agreement that depends for its financial validity on loans from the limited partner and in the absence of any formalized loan terms there exists no definite basis to insure that the general partner will be in a position of control. Wilder has no significant financial commitment or other meaningful tie to the applicant and so, considering all relevant facts, she cannot be counted upon to have a permanent, controlling presence at the station. For these reasons, Weyburn is entitled to no quantitative integration credit whatsover. However, even if Weyburn is found deserving of some integration credit, that credit cannot exceed 30% (the amount equal to the general partner's equity interest) in light of the limited partner's active participation in the partnership's affairs. *See Signal Ministries, Inc.*, 104 FCC 2d 1481 (Rev. Bd. 1986).[12]

255. WKIE receives 10% full-time and 90% part-time (20 hours) integration credit. Jones' 10% ownership interest will be credited. The record establishes that Jones, who will be general manager of the proposed station, is a true and actual owner of his stock. Jones signed a binding subscription agreement which obligates him to pay $2500 for his stock. The fact that Jones may pay for his stock by providing services in lieu of cash is of no consequence. This is particularly the case here where Jones, an experienced general manager, is clearly capable of providing *bona fide* services to the applicant. The record evidence substantiates the fact that two of the proposed integrated principals who hold 90% of the corporation's voting stock

in WKIE are practicing physicians. These two, Drs. Cummings and Belle, have not unambiguously committed themselves to work a regular full-time, forty hours per week at the proposed station. Their testimony is fraught with statements of uncertainty on the point. In the cases of medical professionals, pledges to work full-time and curtail professional employment are suspect. Absent an "additional showing" of the reliability of the integration commitment, the Review Board has determined that a medical professional's integration commitment to be "patently unrealistic." *See Washington Christian Television Outreach, Inc.*, 99 FCC 2d 395, 417-418 (Rev. Bd. 1984), *aff'd as modified*, 59 RR 2d 787 (1985). Here, such "reliability" has not been established and substantial doubt exists as to whether Belle's and Cummings' full-time integration proposals would, or could, be effectuated. Thus, only part-time integration credit has been awarded for their participation.

256. WKIE receives enhancement credit for the local residence and civic involvement of Cummings and Belle. Also, WKIE receives slight credit for Jones' proposed move to the community of license. Jones receives no civic involvement credit since his claimed activities were related to his employment as general manager of WKIE. WKIE receives minority enhancement credit for its proposed integrated principals. In addition, WKIE is enhanced by the past broadcast experience of Jones. Neither Cummings or Belle hold a management or employee position at WKIE. The few hours they spend per week at the station in an ownership overseer capacity does not warrant broadcast experience credit.

257. Even *assuming arguendo* that GRR is basically qualified, it is a classic "sham", entitled to no quantitative integration credit. GRR's prime mover, limited partner Williams, set upon a quest to locate a Black Richmond resident to be GRR's general manager and found Smith. Smith has made no decision independent of the limiteds. The limiteds initiated the radio project, contacted legal and engineering counsel, and Williams appears to have paid all of the applicants's expenses. He, indeed, plans to reimburse Smith for his small contribution to date. Moreover, Smith expects to make his staffing, format, management and salary decisions following discussions with his limited partners. Extraordinarily passive general partners such as Smith deserve no quantitative integration credit. *See, e.g., Tulsa Broadcasting Group*, 64 RR 2d 457 (Rev. Bd. 1977).

258. Even if Smith's 10% ownership interest was credited, GRR will still receive only 10% integration credit. GRR filed its application after the Commission adopted its insulation requirements for non attribution of limited partners.[13] The Commission's insulation standards apply to all pending cases. *Cotton Broadcasting Company*, 4 FCC Rcd. 1781 (1989). However, GRR was unable to produce a limited partnership agreement in effect as of the last day for "amendments as a matter of right." In the absence of a partnership agreement meeting the Commission's insulation requirements, the limited partners' 90% equity interests are attributable for integration purposes, reducing GRR's maximum integration credit to 10%.[14]

259. Bertram is a "sham" applicant. Its limited partner, Bertram Weiner (who named Bertram after himself) has controlled every significant event from applicant formation to applicant financing and application prosecution. Mrs. Sheila Pickett, Bertram's general partner, possesses a 4% equity interest in the applicant; was chosen by the limited partner on the basis of her minority status to improve the applicant's chances; did virtually nothing towards application preparation and prosecution; can -- pursuant to Bertram's partnership agreement -- be removed by Bertram for a broad range of reasons; and must depend upon Weiner to determine her salary and consent to program format and major financial decisions. Such pervasive control by the limited partner leads inescapably to the conclusion that Bertram is not entitled to integration credit. *See e.g., Tulsa Broadcasting Group*, 64 RR 2d 457 (1987). Moreover, at best, Bertram can receive only 4% quantitative integration credit premised upon the equity interest of the general partner. Weiner's 96% equity interest is attributable for integration purposes since Bertram's Partnership Agreement does not comply with the Commission's insulation requirements. *See Cotton, supra.*[15]

260. Benns receives 100% integration credit for her proposal to be the full-time general manager of the proposed station. No evidence has been introduced which raises doubt about Benns' ability to effectuate her integration proposal. Benns' proposal is enhanced by the fact she is a female. Also, she receives slight credit for her proposed move to Richmond. In addition, she receives broadcast experience credit. Benns' membership in the Richmond museum at some unspecified time in the past does not warrant civic participation credit.

261. James River receives 100% full-time integration credit for the proposed participation of McDaniel as the full-time General Manager. The sole voting stockholder of James River has been the initiator of and controlling force in every significant aspect of James River's formation and application filing and prosecution. She has contributed more than her pro rata share of applicant expenses and has dominated every facet of James River from day one. The various arguments of some of the applicants that McDaniel has abdicated control to others and that she will not effectuate her integration proposal rests solely on speculation and conjecture and is unsupported by any record evidence. Where the voting stockholder in a two-tiered corporation initiates and orchestrates all acts essential to applicant formation, application preparation, and application prosecution, the voting stockholder is demonstrably in control and is entitled to full integration. *See Cuban - American Ltd.*, 63 RR 2d 1118 (Rev. Bd., 1987). Moreover, here, the sole voting stockholder, McDaniel, has matched her controlling *actions* with a full personal financial investment in the corporation not merely *equal* to her equity but in excess of it. At the time of the hearing, she had contributed a full 35% to the costs of applicant expenses in excess of her 20% equity share.

262. McDaniel holds a position on the Richmond city council, serving as vice-mayor, which comprises some twelve to fifteen hours of her time per month. She expects to continue in this capacity in the future. Since she became a council member, however, McDaniel has had no difficulty holding down both a full-time and a part-time job. There is no record evidence to support a conclusion that she will have any difficulty devoting full-time to the proposed radio station while continuing to meet her commitments to the city. Indeed, McDaniel's pledge to sever all of her connections with her present employers, the Medical College of Virginia and WENZ radio, will provide her with a minimum of 43 hours per week to devote to the proposed station. In the presence of an

unambiguous commitment to work full-time, no less than forty hours per week at the station, and in the presence of an uncontroverted demonstration of the existence of 43+ free hours to fulfill that commitment, McDaniel has established all requisites to full credit for her proposal. Thus, James River will be credited with 100% quantitative integration credit. *See Cuban - American, supra.*

263. Some of the applicants contend that because McDaniel holds voting and non-voting stock, she is not entitled to integration credit, citing *Cotton Broadcasting Co.*, 60 RR 2d 982 (Rev. Bd. 1986). However, as correctly noted by James River, the Board's determination is inapposite since unlike *Cotton*, this case involves a stock corporation. Unlike the limited partners in *Cotton*, the voting stockholders here are not precluded from participation in the management and operation of the station because they hold non-voting stock. More to the point, the Board's determination in *Cotton* has been overruled. *Cotton Broadcasting Company*, 4 FCC Rcd. 1781, 1782 (1989). The contention that the First Amendment bars public officials in their private capacities from owning and managing broadcast media is devoid of merit and is also rejected. The Commission has, in fact, licensed broadcast stations to public officials. A number of sitting Congressmen hold broadcast licenses. In this connection, it is clear that McDaniel as a private citizen and not the government of Richmond is in control of James River. McDaniel has not applied on the city's behalf but on James River's behalf.

264. James River's integration proposal is substantially enhanced by the continuous forty-eight years of Richmond residence of its sole integrated principal, McDaniel. Moreover, James River's integration proposal is enhanced to a significant degree by her extensive membership and developed relationships with numerous Richmond-based charitable and beneficent organizations. *See, e.g., Community Broadcasting Service, Inc.*, 6 RR 2d 589 (Rev. Bd., 1965) (where forty years of residence coupled with extensive knowledge of the community resulted in a *substantial* preference). Also James River's integration proposal is substantially enhanced by the fact that its 100% voting shareholder and sole integration principal is black and a female. 100% minority and female ownership, like 100% local residence, entitles an applicant to a substantial enhancement. *See, e.g., Radio Jonesboro*, 100 FCC 2d 941 (1984). McDaniel also receives credit for broadcast experience.

265. Future receives 10% integration credit for the proposed participation of Sheila Spurlock, Future's general partner, as full-time general manager of the proposed station. Spurlock had a 10% equity interest as of the "B" cut-off date. Although Spurlock's equity interest subsequently increased, such increases can not be credited since that would constitute an impermissible upgrade. The record establishes that Spurlock was the initiator of the project and involved in all aspects of the formation and prosecution of the application. There is no evidence to suggest that she is and would not be a "true and actual owner" if Future's application were granted. Future's integration credit is limited to 10% because the limited partners' 90% equity interest are attributable for integration purposes.

266. Future's Limited Partnership Agreement does not comply with the insulation standards adopted by the Commission. The Commission's insulation standards require among other things, that the Agreement spell out that an exempt limited partner cannot become materially involved in the management and operation of the station and cannot act as an employee, independent contractor, or agent with respect to the station. In addition, the Agreement must contain a provision restricting the limited partner from communicating with respect to the station. Future's Agreement contains none of these "insulating" provisions. Moreover, not only is there no provision restricting the limited partners from communicating with the general partner on matters pertaining to the day-to-day affairs of the partnership, in Future, the General Partner must communicate with the limited partners upon the written request of a limited partner. Future urges that the Ownership Attribution standards only apply to those limited partnership agreements executed after the April 1986 release of *Daytona Broadcasting*,[16] citing *Independent Masters Ltd.*, 104 FCC 2d 178, 189 n. 25. Future notes that its Agreement was entered into as of December 13, 1985. However, the Commission has rejected the Board's prospective approach and ruled that the new insulation standards apply in all pending cases. The Commission has ruled that it will permit an applicant to amend the partnership agreement to satisfy its insulation requirements only where the agreement was executed before the Commission adopted its standards. *Cotton Broadcasting Company*, 4 FCC Rcd. 1781, 1784 (1989). Future does not fit within this exception since its Agreement was executed after the Commission adopted its insulation requirements. In keeping with *Cotton, supra*, and in the absence of insulation provisions in Future's Agreement, the limited partners' ownership interests are attributable for comparative purposes, reducing Future's integration credit to 10%.

267. Future receives 10% enhancement for Spurlocks' local residence and her minority and female ownership. Also, Spurlock's civic involvement, most of which occurred after Future's application was filed, warrants slight credit. Future also receives credit for Spurlock's broadcast experience.

268. Witjo receives 64% quantitative integration for the proposed participation of Lang, Flammia, Cunningham and Lessin in full-time management positions. Witjo's proposal is enhanced by Cunningham and Lessin's local residence. Witjo receives slight credit for Lang and Flammia's proposal to move to the community of license. Also, Witjo receives very slight enhancement credit for the minimal civic activities of its integrated principals. In addition, Witjo receives 32% credit for the minority ownership of two of its principals and credit for the broadcast experience of three of its four integrated principals.

269. Drucker does not claim integration credit and receives none.

270. VCLP receives 20% integration credit for Mellons' proposed participation as full-time General Manager. VCLP's integration credit is limited to 20% because Beasley's 80% equity interest is attributable for integration purposes.

271. VCLP filed its application on December 16, 1985, after the Commission adopted its insulation requirements for non attribution of limited partners. However, VCLP's principals did not enter into a written partnership agreement until June 3, 1987, approximately eighteen months after the filing of VCLP's application. VCLP receives integration credit for Mellon since, as noted by VCLP in its Reply, its partnership agreement was executed prior to the "B" cut-off date. *See Pacific Television, Ltd.*, 2 FCC Rcd.

1101, 1102 (Rev. Bd. 1987), *rev. denied*, 3 FCC Rcd. 1700 (1988). However, whether Beasley should be treated as an insulated limited partner is governed by the Commission's recent decision in *Cotton*, not *Pacific*. As ruled, *supra*, *Cotton* precludes Future from amending its partnership agreement to cure its failure to include insulation provisions in its original agreement. Surely, VCLP which failed to enter into a partnership agreement in the first instance and did not execute a partnership agreement until 18 months after it filed its application should fare no better. To award VCLP for its belated partnership agreement by allowing it to claim non-attribution of its limited partner, while penalyzing Future, would be inherently unfair. VCLP must also suffer the consequences of having failed to timely include in a partnership agreement the insulation provisions required by the Commission. Beasley's 80% equity interest is, therefore, attributable for integration purposes, reducing VCLP's integration credit to 20%.

272. VCLP receives slight enhancement for Mellon's proposal to relocate his residence to Richmond. Also, VCLP receives enhancement for Mellon's minority status and slight broadcast experience credit for Mellon's employment as Programming Manager and Director of Programming of Telecable Corporation.

Auxiliary Power

273. All the applicants, with the exception of GRR and Bertram, propose and will receive slight credit for maintaining auxiliary power operations.

Comparative Conclusions

274. James River is the winner. Only James River suffers no diversification demerit and receives 100% quantitative integration. Moreover, James River's qualitative enhancement for McDaniels' lifelong local residence, extensive involvement in Richmond civic activities, 100% minority and female ownership, and her broadcast experience is superior to that of any other applicant. The public interest is, therefore, served by a grant of James River's application.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[17] the application of James River Communications Corporation for a construction permit for a new FM Station on Channel 266A in Richmond, Virginia IS GRANTED, and the applications of Eunice Wilder and Sheridan Broadcasting Corp. d/b/a Weyburn Broadcasting Limited Partnership, WKIE-FM, Inc., Greater Richmond Radio, Ltd., Bertram Broadcasting Group, Barbara B. Benns, Future Broadcast Limited Partnership, Witjo Broadcasting, Inc., Penny Drucker, and Virginia Communications Limited Partnership ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] The 24 applications were dismissed for failure to prosecute, pursuant to a voluntary request for dismissal, or pursuant to settlement agreements.

[2] The air hazard issue designated against Weyburn was resolved in its favor. *Order*, FCC 88M-668, released March 10, 1988.

[3] The air hazard issue designated against VCLP was resolved in its favor. *Order*, FCC 87M-3014, released November 20, 1987.

[4] The issue was added by the Presiding Judge. *MO & O*, FCC 88M-1101, released April 13, 1988.

[5] The issue was added by the Presiding Judge. *MO & O*, FCC 88M-1101, released April 13, 1988.

[6] The issue was added by the Presiding Judge. *MO & O*, FCC 88M-1058, released April 11, 1988.

[7] On February 2, 1988, BBG filed an amendment to its application to reflect amended partnership percentages of 20% for Ms. Pickett and 80% for Weiner. The amendment was accepted for Section 1.65 purposes only. *See Order*, FCC 88M-610, released March 4, 1988.

[8] At the time of Pickett's testimony, $16,500 had been deposited in BBG's account (Tr. 981-984).

[9] The Presiding Judge's ruling was rescinded based on Future's assertion that it had never received a copy of VCLP's motion and Future was afforded an opportunity to respond. By *Memorandum Opinion and Order*, FCC 88M-1101, released April 13, 1988, VCLP's motion to enlarge was denied and the abuse of process issue added against VCLP.

[10] Future's opposition, *inter alia*, included a copy of the agreement making the site available signed by Fine and Daly and the site assignment letter assigning Spurlock permission to use the site.

[11] Alpert asserted at hearing that he doesn't believe he would have included the documents received from Fine with VCLP's motion even if he had remembered receiving such documents (Tr. 2433). He states, however, that if he had had a letter-of-intent signed by Fine (VCLP Ex. 9) he would have attached that to his motion although it would not have dissuaded him from filing the motion (Tr. 2451).

[12] Assuming Weyburn receives 30% integration credit for Wilder's participation, Weyburn's proposal would be enhanced by Wilder's local residence and civil participation. Also, Weyburn would receive female and minority credit.

[13] *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 58 RR 2d 604 (1985).

[14] Assuming GRR's proposal is not found to be a "sham", GRR would receive qualitative enhancement for Smith's local residence, civic involvement and minority status.

[15] Assuming Pickett's 4% interest is credited, Bertram receives enhancement for Pickett's local residence, civic participation, minority and female participation and broadcast experience.

[16] *Daytona Broadcasting, Inc.*, 103 FCC 2d 931 (1986).

[17] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

LEACO RURAL TELEPHONE COOPERATIVE, INC. — File Nos. 2476-CF-P-88 through 2535-CF-P-88

For Construction Authorizations in the Point-to-Point Microwave Radio Service and Request for Waiver of the Rules

MEMORANDUM OPINION AND ORDER

Adopted: June 22, 1989; Released: July 3, 1989

By the Chiefs, Common Carrier Bureau and Mass Media Bureau:

1. Leaco Rural Telephone Cooperative, Inc. ("Leaco") has filed the above-captioned applications to construct and operate 30 microwave radio stations for the provision of telephone service to remote and isolated sites in the counties of Lea, Eddy and Chaves, New Mexico.[1] It also has filed a companion request for waiver of the Commission's Rules to use frequencies allocated to the Instructional Television Fixed Service ("ITFS") to provide the telephone service it proposes.[2]

2. The subject applications and waiver request were placed on public notice as being accepted for filing and drew no comments in the 30 day comment period. However, comments were subsequently filed by International Mobile Machines Systems ("IMM"), the Network for Instructional TV, Inc. ("NITV"), the Association for Continuing Education, *et al.*, ("ACE"), the Governor of New Mexico ("Governor"), KLVX, Las Vegas, Nevada ("KLVX"), the Community Telecommunications Network, *et al.*, ("CTN"), the South Carolina Educational Television Commission ("SCETV"), the National ITFS Association ("NIA"), New Mexico Instructional Television Working Group ("NMITV"), Eastern New Mexico University ("ENMU") and New Mexico Junior College ("NMJC").[3] With the exception of the Governor, all of the commenters oppose Leaco's applications and waiver request.

APPLICATIONS AND WAIVER REQUEST

3. Leaco is a wireline common carrier that is certified by the State of New Mexico to provide telephone exchange service to the counties of Lea, Eddy and Chaves, New Mexico. It proposes to use point-to-multipoint microwave radio equipment for the provision of telephone service to prospective subscribers in its service area where it believes landlines or other radio facilities are not cost effective. Leaco says it intends to provide service initially to approximately 15 individuals and businesses in rural areas that have either inadequate and unreliable service or no telephone service at all. Once the system is operational, it intends to add an additional 16 rural subscribers.

4. Leaco explains that its proposed telephone system would provide state-of-the-art voice communication (and data service if desired) to subscribers by its use of equipment manufactured by SR Telecom, Inc. ("SRT"). The SRT equipment is designed to utilize frequencies currently allocated to ITFS.[4] SRT systems, says Leaco, are widely used throughout the world, including rural areas of Texas and New Mexico.[5]

5. Leaco submits that it has shown good cause for waiver. Initially, Leaco contends that the frequency band allocated to the recently created common carrier Basic Exchange Telecommunications Radio Service ("BETRS")[6] is both too expensive and illsuited to accommodate Leaco's needs. An essential element for delivery of voice and data service to isolated areas separated by mountainous terrain, says Leaco, is the use of repeaters, and there is no equipment designed to operate on the frequencies allocated to BETRS that features an economically feasible repeater capacity. In addition, says Leaco, all of the VHF frequencies of the BETRS band in the area to be served by its system have been licensed to Public Land Mobile Service ("PLMS") carriers for use on a primary basis. Consequently the use of these frequencies poses the possibility of unpredictable interference from mobile units. Alternatively, says Leaco, the system it proposes, which utilizes SRT equipment adopted for use in the ITFS band, is ideally suited for Leaco's service needs. The SRT system has sufficient bandwith to provide voice and data, and is configured for use of repeaters on a cost-effective basis.[7] Furthermore, since ITFS licensees do not service mobile users, interference can be better guarded against.

6. Next, Leaco states that the Commission has taken official notice that the ITFS band is currently under utilized outside of urban areas.[8] This is certainly true, Leaco says, in its service area. Leaco avers that its frequency coordination efforts have revealed that only one ITFS licensee exists within 125 miles of the proposed system. This licensee (KTXT-TV, Lubbock, Texas), says Leaco, indicated that it had no objection to the proposed system. Leaco also states it even contacted all other local broadcasters in the Lubbock area to ensure that they did not object. No negative responses were received. Therefore, Leaco says, it has demonstrated that its proposed system will not be detrimental to the assigned users. Moreover, Leaco contends that even in the unlikely event that ITFS stations were proposed to be licensed much closer to its proposed system, sufficient channel groups are allocated to ITFS to allow these other facilities in addition to Leaco's system.

7. Finally, Leaco declares that the public interest clearly would be served by grant of Leaco's waiver request, since it would enable Leaco to provide basic exchange telephone service to persons who would otherwise be unable to receive this service. Leaco asserts that it has met the requisite criteria for grant of a waiver to use frequencies not currently allocated for the proposed service, and the public interest would best be served by waving the Commission's Rules to enable Leaco to provide the telephone service it proposes.

8. The Governor stated his support of waiver in his August 3, 1988 letter, finding "[it] should be noted that LEACO would only require eight of the twenty ITFS channels available in LEACO's service area, thereby leaving ample channels for future ITFS users, in the unlikely event that a demand for an ITFS system arose in rural New Mexico."

OBJECTIONS AND COMMENTS

9. IMM AND NITV were the first two commenters to object to Leaco's proposal. IMM, a radio telephone equipment manufacturer whose product line includes a radio telephone system designed to utilize frequencies assigned to BETRS, contends that Leaco's waiver request contains substantial errors. Contrary to Leaco's assertions, it says, IMM's system is fully operational and it can meet Leaco's service needs better and cheaper than SRT. NITV's stated concern is that a grant of Leaco's waiver request would result in a *de facto* reallocation of the ITFS frequencies to basic exchange telephone service at the expense of education. ITFS, says NITV, has already suffered through the reallocation of ITFS frequencies for pay television usage and there is no need to deplete further the only portion of the spectrum reserved for instructional television when there appears to be alternative methods and technology capable of providing the radio telephone service proposed by Leaco.

10. In response to IMM and NITV's objections, Leaco claims that neither has refuted its showing that a waiver is necessary and appropriate. The system it proposes, says Leaco, will best serve the needs of its subscribers, and its use of a small portion of the ITFS band will not hinder the foreseeable growth of instructional television.

11. Leaco claims that IMM is merely trying to promote its own interests and technology, whereas Leaco has no incentive for choosing one radio system over another, other than to best satisfy its service requirements. Before formulating its proposal, Leaco says, it gave due consideration to IMM's equipment and determined that it is not well suited for Leaco's particular service needs. First, it states, IMM's equipment is too expensive. An IMM system would cost approximately $650,400 to construct, as opposed to an SRT system which would cost approximately $480,800.[9] Furthermore, the difference in relative costs would become even greater as Leaco's service area is expanded. Since an IMM system does not have the repeater capability of an SRT system, expansion, says Leaco, would require additional radio carrier stations and a digital point-to-point microwave link to connect each new station to the system's central office. Operating costs of an IMM system would also be greater, because it requires significantly higher input power for its base stations and central office terminal than an SRT system would. Secondly, an IMM system may experience interference from mobile units. Leaco says that its detailed examination of UHF usage near its service area indicates that 18 of the 26 allocated UHF channels are licensed to PLMS operations at distances less than the required 67 mile minimum mileage separation.[10] Finally, and most importantly, claims Leaco, an IMM system would need nine UHF channels (three per base station) to serve Leaco's present subscriber needs, and only eight are not occupied by PLMS licensees. Although some channel reuse is possible, says Leaco, it is not certain that enough channels would be available to construct an IMM system that would be free from interference from protected users, and expansion would certainly be impossible.

12. Replying to Leaco's opposition, NITV retorts that Leaco's claim that there is no present or foreseeable demand for the ITFS frequencies is neither a legitimate reason for waiver nor is it true. NITV says because ITFS development depends heavily on fund raising and public supported means, growth is slow. Furthermore, it adds, there is a demand for instructional television in rural America. For example, says NITV, South Carolina has established a vast ITFS network that serves rural as well as urban areas of the state.

13. IMM, in its reply, aside from reiterating the arguments presented earlier, claims that Leaco's estimated costs of BETRS equipment is at variance with IMM's experience. Also, IMM says that Leaco has incorrectly stated that nine BETRS radio channels are necessary to provide service and that only eight are available in its service area. IMM's BETRS equipment, we are advised, would require only three to four radio channels to provide full telephone grade of service to Leaco's service area.

14. Thereafter, the comments of the remaining parties were submitted.[11] With the exception of the Governor, all of the parties are opposed to Leaco's proposal. The arguments expressed by ACE, KLVX, CTN and SCETV are nearly identical to those presented by NITV in its opposition. In addition to these arguments, NIA claims that Leaco has not articulated sufficient basis for its requested waiver. Merely saying that any attempt to provide telephone service by means other than ITFS frequencies "would very likely prove to be uneconomical", says NIA, is not enough. NIA points out that Leaco has made no claim that it would be impossible to provide service by other means, only that it would be less profitable to do so.

15. The final commenters, NMITV, ENMU and NMJC, are apprehensive about the effect Leaco's proposal would have upon the future of instructional television in New Mexico. All three commenters state they are actively involved in a cooperative effort to establish a statewide instructional television system that will rely heavily on ITFS for delivery of educational programming. In addition, ENMU and NMJC have individual plans to utilize ITFS. Consequently each commenter requests that Leaco's waiver request be denied.

DISCUSSION

16. It is beyond dispute that the provision of basic telephone service promotes the public interest. The Commission has repeatedly acknowledged its commitment to make universal telephone service in this country a reality.[12] A recent example of this resolve was the creation of BETRS, which provides a cost-effective alternative to conventional wire-line facilities for connecting rural subscribers to the national telephone network.[13] Leaco submits, however, that BETRS does not meet its needs, and requests that the Commission's Rules be waived to enable it to utilize frequencies allocated to ITFS.

17. A party seeking a waiver of the Commission's Rules is obligated to demonstrate the existence of extraordinary or special circumstances justifying the waiver.[14] In spectrum allocation matters the central concern is whether the proposed use has a relatively greater value to the public than other potential uses. Consequently, Leaco

must establish that the system it proposes represents the most effective use of the ITFS band from a public interest perspective.[15] This requires that Leaco make the following demonstration: that the BETRS band is not suited or is insufficient to accommodate its requirements; that the ITFS band is under utilized; that Leaco's proposed use of the ITFS band will not hinder the foreseeable growth of instructional television; and that the public interest will be served by a grant of the waiver.[16]

18. Leaco has not met its burden of demonstrating that the BETRS band is not adequate to accommodate its requirements. Leaco's lead application and its reply to the comments filed by IMM and NITV each contain a statement of its consulting engineer. Presumably these statements are included to verify Leaco's contentions that it has met the Commission's waiver requirements. We are not convinced that they do. In its application, Leaco states that the statement of its consulting engineer shows that none of the frequencies presently allocated to BETRS would enable Leaco to provide the services it proposes, either because the allocated frequencies are unreliable or because there is no technology available that offers repeaters for reaching subscribers in remote and isolated areas. We have reviewed Leaco's application and accompanying engineering statement and find the conclusions are not supported. For instance, we are told that the VHF-band frequencies allocated to BETRS have all been licensed to PLMS and therefore none are available for Leaco's use. We are not presented, however, with any factual documentation of how this conclusion was reached. Then we are told that it would not be economically or technologically feasible to utilize the shared UHF-band frequencies presently allocated to BETRS because no technology exists that features the repeater capacity upon which Leaco depends. Again it is not clear how Leaco arrived at this conclusion. We are led to believe that the entire radio equipment industry was surveyed, yet the only equipment manufacturer mentioned is IMM, which Leaco says does not have the repeater capacity that it requires.

19. Leaco's reply, in addition to repeating many of the claims presented in its application, does provide us with its engineer's comparison between its proposed system and one utilizing equipment manufactured by IMM. The figures presented indicate that it would cost Leaco's subscribers approximately 29.6% more to receive the same service from a system ulitizing IMM equipment than it would from a system employing SRT equipment. The difference in costs appears to be due to the economies realized by SRT's solar powered repeaters. Leaco, therefore, submits that the only means of providing affordable service to subscribers and to keep construction costs consistent with the availability of its REA financing, is through the use of the SRT system. Leaco has not, however, provided any indication of what REA financing is available to it. Consequently, the significance of the comparison is not clear. Moreover, Leaco has not demonstrated why the approximately $650,400 is unreasonable nor how this investment would unreasonably impact on its ability to earn its authorized rate of return.

20. Next Leaco contends that an IMM system may experience interference from mobile units utilizing some of the shared UHF-band channels near Leaco's service area. It documents that 18 of the 26 local UHF channels are licensed to PLMS, at distances less than the 67-mile minimum mileage separation required by Section 22.503 of the Commission's Rules. Some of the licensed operations, we are told, would be only 4 to 24 miles from Leaco's main base transmitter sites, and even closer to outlying subscribers. Therefore, Leaco argues that the danger of interference from mobiles is an obstacle that significantly hinders the potential use of an IMM system. However, Leaco appears to have overlooked the fact that the problem of potential interference between fixed radio stations and roaming mobile units on co-channel frequencies was addressed by the Commission in the BETRS proceeding, wherein the Commission concluded that the two services were sufficiently compatable.[17] As the party seeking waiver, it is incumbent on Leaco to demonstrate with specificity precisely where and why unacceptable interference necessarily would result.

21. Finally, Leaco alleges that an IMM system would be incapable of providing the telephone service that Leaco's present subscriber needs require. Leaco's engineer contends that an IMM system would require at least 9 UHF channels (3 at each base station site) and the Commission's records indicate that only 8 channels are not licensed to PLMS operations within the minimum mileage separation. Conceding that an IMM system may be engineered to reuse some of the channels, Leaco says it cannot be assured that the necessary number of channels will be available. This claim is refuted by IMM, which submits that its BETRS equipment would require, at most, four UHF channels to serve Leaco's subscriber needs. Leaco does not challenge IMM's counterclaim, and it, therefore, is not apparent that the available BETRS spectrum is either illsuited or insufficient to accommodate perceived needs. In view of the foregoing, it appears only that the use of the BETRS band may be slightly more expensive than a system utilizing ITFS frequencies. We therefore find that Leaco has not demonstrated that the BETRS band is not suited or is insufficient to accommodate its requirements.[18]

22. Leaco's assessment of the foreseeable demand for ITFS spectrum in Southeastern New Mexico also is not adequate to warrant waiver. Leaco's submission that its proposal would not be detrimental to ITFS' assigned users, which it based on the fact that it found no ITFS licensees in the vicinity of its proposed telephone system, presents no probative showing regarding the future use of these frequencies. Rather than contacting local broadcasters in and around Lubbock, Texas, whose interest in providing ITFS in New Mexico is not apparent, Leaco should have made its inquires with the logical potential users of the ITFS band, educational institutions and organizations in New Mexico. If it had, it would have discovered that plans to utilize the ITFS frequencies for educational purposes throughout New Mexico were underway.[19] We are advised that the New Mexico State Legislature has granted ENMU $300,000 to extend its ITFS system to NMJC's campus at Hobbs, New Mexico, and that both ENMU and NMJC are currently using radio facilities to provide college courses beyond their main campuses. Both of those institutions, as well as others, are also actively involved in NMITV, a statewide task group that has structured an instructional television network that is designed to enhance the educational opportunities of their rural patrons. Moreover, ENMU and NMJC individually, and collectively through NMITV, view Leaco's proposal as a threat to the future growth of instructional television throughout New Mexico. Their plans to expand the availability of instructional television are based on the presumption that the presently available ITFS band will

remain unaltered. Leaco has not shown its proposed use of two of the five channel groups allocated for ITFS use would be compatiable with these plans.[20]

23. We have taken a "hard look" at Leaco's request and we find that Leaco has not met its burden of proving a grant of its waiver to use ITFS spectrum would not obstruct the foreseeable growth of instructional television.[21] While there currently are no ITFS applicants or licensees for these frequencies in Leaco's service area, plans for extensive use of the ITFS spectrum are well along. And although the Governor has not modified or retracted his statement, the fact that Leaco apparently did not contact any potential ITFS users in New Mexico combined with the specific plans to use the ITFS spectrum that those entities have submitted precludes us from finding that Leaco has met its burden.

24. In view of the foregoing, we are unable to conclude that the public interest would be served by a grant of Leaco's waiver request and consequently its applications. The cost savings that might be realized if Leaco were allowed to use ITFS frequencies, rather than those assigned to BETRS, are outweighed by the threat that reallocation poses to future plans for providing educational opportunities to the citizens of New Mexico.

25. Accordingly, IT IS ORDERED, that the request for waiver IS DENIED and the above-captioned applications ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTES

[1] These counties are located in the southeastern corner of the state.

[2] Specifically, Rule Sections 22.601, 21.701, 74.939(d), 21.120 and 21.108.

[3] Although these pleadings were not timely filed, it seems that their lateness was at least in part due to confusion concerning our public notice rather than a lack of diligence by the parties. Therefore, we have classified their comments as informal objections and we have made them part of this proceeding. *See*, 47 C.F.R. 21.30(b).

[4] This group of frequencies occupies the 2500-2690 MHz band, which is divided into thirty-one 6 MHz channels that are assigned to seven four-channel groups and to one three-channel group designated Group A through Group H. ITFS has exclusive use of the A, B, C, D and G Groups and it shares, in varying degrees, the remaining channel groups with the Multipoint Distribution Service (E and F Groups) and the Private Operational Fixed Microwave Service (Group H). *See* Amendment of Parts 2, 21, 74, and 94 of the Commission's Rules in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, 94 F.C.C. 2d 1203 (1983), *reconsideration denied*, 98 F.C.C. 2d 129 (1984).

[5] Leaco notes that the use of this system was approved by the Commission in Big Bend Telephone Company, Inc., 2 FCC Rcd 2413 (1986) (*"Big Bend Telephone"*).

[6] *See*, Report and Order in CC Docket No. 86-495, 3 FCC Rcd 214 (1988).

[7] Leaco estimates that the cost to establish the proposed subscriber microwave system to be $537,020.

[8] Citing Report and Order in Gen. Docket No. 80-112, 94 FCC 2d 1203, 1213-14 (1983).

[9] Leaco's original application indicated that its equipment and other costs would total $537,020. This figure, says Leaco, included a proposed extention of the system to serve rural areas near Plains, Texas. This proposal was deleted prior to filing, but, due to an oversight, the costs associated with the Plains extension were not deleted from the estimated expenses.

[10] *See*, 47 C.F.R. § 22.503.

[11] Leaco has not responded to any of these pleadings directly.

[12] *See, e.g.*, 3 FCC Rcd 214, 219 (1988).

[13] *See*, 3 FCC Rcd 214 (1988).

[14] *See*, WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[15] *See*, Nevada Bell, 3 FCC Rcd 7217 (1988).

[16] *See*, Nevada Bell, *id. See also* Big Bend Telephone, note 4, *supra*.

[17] 3 FCC Rcd 214, 217-218 (1988).

[18] Leaco also appears to be unwilling to consider other channel groups in the 2500 - 2690 MHz band. It dismisses any consideration of channel groups E and F, which are allocated to Multichannel Multipoint Distribution Service ("MMDS"), as having insufficient spacing between them to allow for the required separation between the transmit and receive functions of SRT's equipment. It fails, however, to demonstrate how wide a separation is necessary. Nor is there any mention of why it could not lessen the impact on ITFS by utilizing one MMDS channel group and one ITFS channel group.

[19] *Compare*, Nevada Bell, *supra*.

[20] Leaco's proposal would effectively deprive ITFS users of the D and G channel groups.

[21] *See*, WAIT Radio v. FCC, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

DATA CELLULAR SYSTEMS — File No. 10029-CL-345-A-88

For a construction permit to establish a new cellular system to operate on Frequency Block A in the Domestic Public Cellular Telecommunication Radio Service to serve the California -10 (Sierra) Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 1989; Released: July 3, 1989

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On November 25, 1988, Data Cellular Systems (Data Cellular) was named tentative selectee in the lottery for the non-wireline Block A construction authorization for the California - 10 (Sierra) Rural Service Area (RSA), market number 345-A.[1] Templeton, Inc. (Templeton) and Richard L. Vega (Vega), mutually exclusive applicants, filed petitions to deny and Data Cellular filed a consolidated opposition to the petitions to deny.[2]

II. CONTENTIONS OF THE PARTIES

2. In its petition to deny, Templeton argues that substantial questions of fact exist as to whether Columbia Security and Transfer, Inc. (Columbia), which provided Data Cellular's firm financial commitment letter, meets the requirements of a recognized lending institution as defined in Section 22.917(c)(5) of the Commission's Rules.[3] Templeton asserts that Data Cellular obtained a letter "purporting to represent a firm financial commitment" from Columbia, which is a corporation organized under the laws of the Province of Ontario, Canada, whose corporate purpose is to "buy and sell securities, common stock, bonds, certificates of deposit, bills of lading, warehouse receipts and other financial papers."[4] Templeton asserts that it has been informed that Columbia is not registered with the Office of the Superintendent of Financial Institutions of the Province of Ontario or as an investment banker with the Ontario Securities Commission and is therefore not a bona fide financial institution. Petition at 2. Templeton further argues that a material question of fact exists as to whether Columbia has the ability to fulfill its financial commitment to Data Cellular.

3. Similarly, in its Petition to Deny, Vega argues that Data Cellular failed to demonstrate its financial qualifications because Columbia is "a Canadian business and is not readily recognized in the United States as a financial institution."[5] Further, Vega argues that Data Cellular failed to provide the necessary evidence to prove Columbia is capable of making a firm financial commitment to the applicant.[6] In addition, Vega contends that Data Cellular's application is defective because Data Cellular filed an obsolete antenna pattern exhibit and illegible microfiche copies.

4. In its consolidated opposition to the Templeton and Vega petitions, Data Cellular first argues that it has complied with all Commission requirements to demonstrate its financial qualifications. In this regard, Data Cellular contends that Columbia has been in the investment banking business since 1973, falls within the standards for financial institutions established in the Commission's *Fourth Report and Order* in CC Docket No. 85-388, 64 Rad. Reg. 2d (P & F) 1391 (1988) (recon. pending) and is recognized as a financial institution both by other financial institutions and by the Commission. Data Cellular notes that Columbia supplied financial commitment letters for six lottery-winning Metropolitan Statistical Area (MSA) cellular applicants, each of whom received construction authorizations. Data Cellular argues that, although the time for filing a financial commitment letter to accompany a non-wirline RSA cellular application is at the time the application is filed rather than 30 days from the public notice announcing the tentative selectee for MSA applicants, the Commission maintained the same substantive requirements for a firm financial commitment for RSA markets as existed for the later-round MSA markets in which Columbia was involved. With regard to Columbia's commitment letter and its ability to provide financing, Data Cellular argues that Columbia considered the creditworthiness of the applicant, evaluated the economics of the applicant's proposed markets, and issued a commitment letter which states all material terms. Further, Data Cellular argues, that Columbia has over $329 million in current assets, including almost $99 million in net liquid assets, to support its $1.5 million financial commitment to Data Cellular. In addition, Data Cellular asserts that Columbia has syndicated $850,000 of its firm financial commitment to Philips Credit Corporation[7], and that this participation is expressly permitted for RSA applications and has been used by the Commission as one measure of qualifying as a financial institution. *Report and Order* at note 9.

5. With regard to Vega's assessment that the Data Cellular application contained an outdated antenna pattern, Data Cellular argues that (1) neither its 39 dBu contour nor its CGSA extends beyond the RSA boundaries, (2) that its engineering as a whole does not violate any Commission rule and (3) that in order to fully resolve the issue, in accordance with the Rules, it has amended its application to use an updated antenna pattern. Finally, Data Cellular contends that a reproduction of its original application and copy of its microfiche application, reprinted from the Mobile Services Division (MSD) are readable, and appends copies to its pleading as tangible proof.

III. DISCUSSION

6. The Petitioners argue that Data Cellular's application is defective in that it fails to comply with the financial requirements contained in Section 22.917(c) of the Rules and should, therefore, be dismissed. Section 22.917(c) sets forth the requirements for RSA applicants regarding the demonstration of their financial qualifications and requires that non-wireline applicants file a firm financial commitment letter at the time they file their application. *See* Section 22.917(c)(1). In the *Report and Order*, at paragraph 2, the Commission stated clearly its desire to maintain the integrity of its licensing processes by limiting eligibility for RSA applicants to those who sincerely intend, and are actually able to provide, high quality cellular service. The Commission adopted Section 22.917(c) in order to attain this goal. Under Section 22.917(c), all non-wireline applicants are required to demonstrate that they have funds available or that they have received a firm financial commitment from a lender to provide the necessary funds. In the *Report and Order*, at paragraph 18, the Commission adopted specific requirements for obtaining the necessary commitment letter, including the requirement that the firm financial commitment be related to the creditworthiness of the individual applicant, making such a commitment the primary "applicant unique" portion of the application thereby eliminating the filing of multitudes of applications financially guaranteed by those who prepared them.

7. In addition, the Commission adopted Section 22.917(c)(5) which provides that the firm financial commitment letter be obtained from a state or federally chartered bank or savings and loan association, another recognized financial institution or the financial arm of a capital equipment supplier. The Commission adopted a broad definition of "lender" and noted that it does not wish to "exclude legitimate non-bank institutions that are in the business of lending money or raising equity, such as investment banking houses." *Report and Order* at paragraph 31. The Commission declined to provide an exhaustive list of acceptable financing alternatives but did specifically sanction syndication, the accepted banking practice of selling participation shares of loans to other institutions. *Report and Order* at note 9.

8. Our review of Data Cellular's firm financial commitment letter indicates that Columbia complied with the Commission's lending requirements for RSA applicants. Columbia considered the creditworthiness of the applicant and the financial viability of the project. Columbia's letter stated that it was committed to lend the sum of $1.5 million to the applicant. After an examination of Columbia's financial statements,[8] we find that Columbia has net liquid assets of $99 million and, therefore, conclude that Columbia has sufficient financial resources to meet its RSA firm financial commitment to Data Cellular.

9. We also find that Columbia is a qualified financial institution under the Rules. Section 22.917(c)(5) contemplated RSA applicants seeking firm financial commitments from recognized non-bank financial institutions. The record indicates that since 1973, Columbia has been the investment-banking house and stock transfer agent for a number of publicly traded U.S. companies. Additionally, Columbia specializes in borrowing and lending large sums to and from private individuals and institutions and has sold over $125 million (US) in certificates of deposit over the past twelve months and used these proceeds to fund a variety of letters of credit and commercial loans.[9] On numerous occasions, Columbia has been recognized by the Commission as a financial institution qualified to provide firm financial commitments to cellular applicants. While the Rules regarding the demonstration of financial qualifications differ in part from those for MSAs, the definition of a qualified financial institution has remained the same.

10. With respect to the antenna issue raised by the Vega petition, we agree with the applicant's analysis and find that the revised horizontal radiation pattern filed in its 1.65 amendment is minor and conforms to the specifications required by our Rules. After an application has met our pre-lottery filing requirements, we have allowed minor discrepancies to be corrected by amendment. *See e.g., Timothy Roper*, 2 FCC Rcd 4458 (Com. Car. Bur. 1987), *application for review pending* (application amended to correct technical exhibits and minor errors in cost figures). Furthermore, we find that the microfiche submitted by applicant is readable.

IV. CONCLUSION AND ORDERING PARAGRAPHS

11. After carefully reviewing the facts and circumstances in the record before us, we will grant Data Cellular's application. Further, we find that Data Cellular has been found to be legally, financially and technically qualified to construct and operate the requested facilities.

12. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules, that the application of Data Cellular Systems, File No. 10029-CL-P-345-A-88, IS GRANTED.

13. IT IS FURTHER ORDERED that the petitions to dismiss filed by Templeton, Inc. and Richard L. Vega ARE DENIED.

14. IT IS FURTHER ORDERED that all non-wireline cellular applications in the Sierra, California RSA, other than the application of Data Cellular Systems, ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Public Notice, Report No. CL-89-35 (November 25, 1988).

[2] After filing his petition to deny, Vega submitted a letter with additional information. Data Cellular filed a motion to strike the letter from the record, and Vega filed a reply. On April 5, 1989, Data Cellular filed a 1.65 amendment supplementing its financial qualifications exhibit to its application. On April 24, 1989, Vega filed a reply and Data Cellular responded.

[3] *See* note 8, *infra*.

[4] *See* Petition at 3 and Columbia Certificate of Incorporation, dated October 1, 1973, at Tab A.

[5] Additionally, the petitioners allege that the principals of Columbia have engaged in securities fraud. Supplementing both petitions is a copy of two unverifed newspaper articles. Data Cellular informs us that Columbia and its principals deny all

charges against them and maintain that they are innocent of all wrongdoing. Columbia and its principals are not the applicant. Therefore, Columbia's character qualifications are not determinative of the question of whether or not the applicant, Data Cellular, is qualified to be a Commission licensee. Moreover, it is our policy not to inquire even into an applicant's qualifications on the basis of alleged criminal activity unless it results in a conviction or adverse civil decision. *See IT & E Overseas, Inc.*, DA 89-442, (Mob. Ser. Div., released April 24, 1989).

[6] In its late filed pleading of April 24, 1989, Vega contends that Data Cellular's 1.65 amendment, which memorializes the syndication to Philips Credit Corporation of a portion of Columbia's letter of credit, constitutes a major amendment and an impermissible substitution of financial institutions. We reject this argument and find that the applicant's firm financial commitment from Columbia was timely filed with its application. That Columbia made a business judgment to obtain a participation loan at a future point in order to best structure its commitment to Data Cellular, is irrelevant to our inquiry into whether Data Cellular had a firm financial commitment at the time it filed its application.

[7] Philips Credit Corporation is the U.S. financing arm of Philips, N.V., a multinational company engaged in the manufacture and distribution of electronics equipment with a net worth of over $7.5 billion dollars at exchange rates current with the filing of Data Cellular's Opposition.

[8] *See* Opposition at Tab 1.

[9] *See* Letter from Al McBain, Q.C., Counsel to Columbia to the Commission (November 29, 1988). Opposition at Tab 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-611

In the Matter of

Amendment of Section 73.202(b), RM-6494
Table of Allotments,
FM Broadcast Stations.
(Rockland, Maine)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 15, 1989; Released: July 5, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 1228 (1988), issued in response to a petition filed by Passamaquoddy Broadcasting, Inc. (petitioner), proposing the substitution of FM Channel 277B for Channel 277B1 at Rockland, Maine.[1] Petitioner also requested modification of its license for Station WMCM-FM, Channel 277B1, to specify operation on the new channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 277B for Channel 277B1 at Rockland, Maine, since it could provide the community with a wide coverage FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the petitioner's specified site.[2] Since Rockland is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained. The proposal for Rockland must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding protection to the Commission's monitoring station at Belfast, Maine. In addition, we have authorized a modification of the petitioner's license for Station WMCM-FM, Rockland, Maine, to specify operation on Channel 277B in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 21, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Rockland, Maine	277B

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WMCM-FM, Rockland, Maine, IS MODIFIED TO SPECIFY operation on Channel 277B, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Report and Order in Docket 86-183 substituted FM Channel 277B1 for Channel 228A at Rockland, and modified the license of Station WMCM-FM to specify operation on Channel 277B1. That action was effective on July 25, 1988.

[2] The coordinates for Channel 277B at Rockland are 44-07-34 and 69-08-19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-296

In the Matter of

Amendment of Section 73.606(b), RM-6635
Table of Allotments,
Television Broadcast Stations.
(Springville, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 15, 1989; Released: July 5, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Michael A. Williams (petitioner), requesting the allotment of UHF TV Channel 67 to Springville, New York, as the community's first local television service. Petitioner states that he will apply for the channel, if allotted.

2. Channel 67 can be allotted to Springville in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.8 kilometers (5.5 miles) south to avoid a short-spacing to Channel 60 at St. Catherines, Ontario, Canada, and to the proposed allotment of Channel 62 to Arcade, New York.[1] Canadian concurrence in the allotment is required since Springville is located within 250 miles of the U.S.-Canadian border. This proposal, however, is not affected by the temporary freeze on new allotments since the community is not located within the minimum co-channel separation distance to any of the metropolitan areas identified in the Commission's Public Notice. *See, Order*, 52 FR 28346, July 29, 1987.

3. We believe the public interest would be served by proposing the allotment of Channel 67 to Springville, New York, since an interest has been expressed in providing the community with its first local television service. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Springville, New York	--	67+

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 28, 1989,** and reply comments on or before **September 12, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Michael A. Williams
65 Monroe Street
Buffalo, New York 14206
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 42-26-02 and West Longitude 78-38-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-297

In the Matter of

Amendment of Section 73.202(b), RM-6698
Table of Allotments,
FM Broadcast Stations.
(Hatteras, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 15, 1989; Released: July 5, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Pamlico Sound Company, Inc. (petitioner), requesting the substitution of Channel 246C1 for Channel 248C2 at Hatteras, North Carolina, and the modification of its construction permit for a new station on Channel 248C2 to specify the higher powered channel. Petitioner states that it will apply for the channel, if allotted. Channel 246C1 can be allotted to Hatteras in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in its outstanding construction permit.[1]

2. As requested, we shall also propose to modify petitioner's construction permit to specify operation on Channel 246C1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the channel at Hatteras or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 246C1 for Channel 248C2 at Hatteras, North Carolina, since it could enable petitioner's station to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Hatteras, North Carolina	248C2	246C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 28, 1989,** and reply comments on or before **September 12, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard J. Hayes, Jr., Esq.
1359 Black Meadow Road
Greenwood Plantation
Spotsylvania, Virginia 22553
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 35-15-42 and West Longitude 75-33-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-495

In the Matter of

Amendment of Section 73.202(b), RM-6421
Table of Allotments,
FM Broadcast Stations.
(Montauk, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 15, 1989; Released: July 5, 1989

By the Chief, Allocations Branch:

1. At the request of Nanette Markunas (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 6120 (1988), proposing the allotment of Channel 235A to Montauk, New York, as the community's second local FM service. The petitioner and Ionie Evans ("Evans") filed comments and Eric Saltzman ("Saltzman") filed reply comments.[1]

2. All of the parties expressed an intention to apply for Channel 235A, if allotted to Montauk. Petitioner, however, states that it will be difficult to meet the spacing requirements with the proposed site restriction of 4.9 kilometers southwest to avoid a short-spacing to Station WOCB-FM, West Yarmouth, Massachusetts, because of changes in local zoning laws. Petitioner notes that, if Channel 236B were substituted for Channel 235B at West Yarmouth, Channel 235A could be allotted to Montauk without the imposition of a site restriction. Therefore, she requests that the application filing window be delayed until a rule making proceeding proposing the substitution of channels for Station WOCB-FM at West Yarmouth, Massachusetts, is resolved. *See* MM Docket 87-484, 3 FCC Rcd 6793 (1987) and Public Notice of counterproposal given on January 27, 1988, Rept. No. 1431. Alternatively, petitioner suggests the allotment of Channels 225A or 277A.

3. Saltzman states that there is no need to delay action on the allotment or application filing window pending the resolution of the West Yarmouth proceeding. He believes, based on an investigation of the area, that there are several locations, without zoning problems, that could accommodate a tower, including one near Napeague Bay where another communications tower is already located. As to the alternate channels suggested by petitioner, Saltzman believes that both channels may be virtually unuseable. Specifically, he states that Channel 225A must be site restricted southwest of Montauk to avoid a short-spacing to Station WBOS(FM), Brookline, Massachusetts. However, he states that the necessary site restriction would place the transmitter site in water. Likewise, Channel 277A must be site restricted to avoid a short-spacing to Stations WODS(FM), Boston, Massachusetts, and WWRX(FM), Westerly, Rhode Island. A site restriction meeting the spacing requirements to these allotments, according to Saltzman, would put the transmitter either too far from Montauk to place the required 70 dBu signal over all of the community or require a site off land. Therefore, he urges the allotment of Channel 235A with the proposed 4.9 kilometer southwest site restriction.

4. Based on the record before us, we believe the public interest would be served by allotting Channel 235A to Montauk, New York, as the community's second local FM service. Channel 235A can be allotted with a site restriction of 4.9 kilometers (3.1 miles) southwest to avoid a short-spacing to Station WOCB(FM), Channel 235B, West Yarmouth, Massachusetts.[2] Based on the information provided by Saltzman, we do not believe that the public interest would be served by delaying action on the allotment or the application filing window until final resolution of MM Docket 87-484 concerning the West Yarmouth allotment. Further, we have confirmed that both Channel 225A and Channel 277A at Montauk would require a site restriction of at least 12.5 kilometers (7.8 miles) southwest with the attendant problems of site location and provision of the required 70 dBu signal to all of Montauk.

5. Canadian concurrence in the allotment of Channel 235A to Montauk has been received since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 21, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Montauk New York	235A, 284A

7. The window period for filing applications will open on **August 22, 1989,** and close on **September 21, 1989.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Saltzman's reply comments were filed apprroximately 10 days late, but were accompanied by a request for their acceptance. Saltzman states that he was unable to investigate more speedily the availability of transmitter sites in response to peti-

tioner's claim that changed zoning laws might make use of the channel impossible, and that the reply will facilitate resolving the proceeding without unnecessary delay. We agree, and will consider the reply comments.

[2] The coordinates for this allotment are North Latitude 41-01-00 and West Longitude 72-00-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
Report No. DS-871

Released: June 23, 1989

COMMON CARRIER SERVICES INFORMATION
PRIVATE RADIO SERVICES INFORMATION

INFORMATIVE:

Two groups of applications have been filed simultaneously with the Private Radio Bureau and the Satellite Radio Branch and Domestic Radio Branch of the Common Carrier Bureau seeking Commission consent to a transfer of control of licenses in various radio services (Domestic Fixed-Satellite Service; Point-to-Point Microwave Radio Service; and Private Operational Fixed Microwave Service). The proposed transfers of control will require a two step process, and they stem from the unsolicited (or "hostile") tender offer of MMM Holdings, Inc. for the shares of LIN Broadcasting Corporation.

(Step 1)

The first step is for consent to transfer control from the Shareholders of LIN Broadcasting, Inc. to Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc. In addition, a request for Special Temporary Authorization for this first step has been filed. Upon initial review, the applications for Step 1 listed below have been found to be acceptable for filing. The Commission reserves the right to dismiss any of these applications if upon further examination it is determined that they are defective and not in conformance with Commission rules and policies.

Domestic Fixed - Satellite Service:

1641-DSE-TC-89; 1652-SSA-TC-89 Consent to the transfer of control of North Texas Broadcasting Corp., Call Sign E4323, from Shareholders of LIN Broadcasting, Inc. to Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc.

1644-DSE-TC-89(2); 1653-SSA-TC-89(2) Consent to the transfer of control of Indiania Broadcasting Corp., Call Signs E4334 and E4406, from Shareholders of LIN Broadcasting, Inc. to Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc.

1646-DSE-TC-89(2); 1654-SSA-TC-89(2) Consent to the transfer of control of WAND Television, Call Signs E4707 and E8151, from Shareholders of LIN Broadcasting, Inc. to Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc.

1648-DSE-TC-89; 1655-SSA-TC-89 Consent to the transfer of control of Kingstip Communications, Inc., Call Sign E4324, from Shareholders of LIN Broadcasting, Inc. to Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc.

1650-DSE-TC-89; 1656-SSA-TC-89 Consent to the transfer of control of LIN Central Broadcasting Corp., Call Sign E8173, from Shareholders of LIN Broadcasting, Inc. to Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc.

Point-to-Point Microwave Service:

3382-CF-TC-(1)-89 Consent to the transfer of control of Los Angeles Cellular Telephone Company from Shareholders of LIN Broadcasting, Inc. to Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc.

3384-CF-TC-(3)-89 Consent to the transfer of control of Metroplex Telephone Company from Shareholders of LIN Broadcasting, Inc. to Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc.

3386-CF-TC-(1)-89 Consent to the transfer of control of Houston Cellular Telephone Company from Shareholders of LIN Broadcasting, Inc. to Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc.

Private Operational Fixed Microwave Service:

901415 Consent to the transfer of control of LIN Central Broadcasting Corp., Call Sign WNEM522, from Shareholders of LIN Broadcasting, Inc. to Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc.

(Step 2)

The second step seeks approval for MMM Holdings, Inc. to assume control of LIN Broadcasting Corporation. Upon initial review, the applications for Step 2 listed below, have been found to be acceptable for filing. The Commission reserves the right to dismiss any of these applications if upon further examination it is determined that they are defective and not in conformance with Commission rules and policies.

Domestic Fixed-Satellite Service:

1642-DSE-TC-89 Consent to the transfer of control of North Texas Broadcasting Corp., Call Sign E4323, from Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc. to MMM Holdings, Inc.

1645-DSE-TC-89(2) Consent to the transfer of control of Indiana Broadcasting Corp., Call Signs E4334 and E4406, from Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc. to MMM Holdings, Inc.

1647-DSE-TC-89(2) Consent to the transfer of control of WAND Television, Call Signs E4707 and E8151, from Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc. to MMM Holdings, Inc.

1649-DSE-TC-89 Consent to the transfer of control of Kingstip Communications, Inc., Call Sign E4324, from Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc. to MMM Holdings, Inc.

1651-DSE-TC-89 Consent to the transfer of control of LIN Central Broadcasting Corp., Call Sign E8173, from Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc. to MMM Holdings, Inc.

Point-to-Point Microwave Service:

3383-CF-TC-(1)-89 Consent to the transfer of control of Los Angeles Cellular Telephone Company from Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc. to MMM Holdings, Inc.

3385-CF-TC-(3)-89 Consent to the transfer of control of Metroplex Telephone Company from Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc. to MMM Holdings, Inc.

3387-CF-TC-(1)-89 Consent to the transfer of control of Houston Cellular Telephone Company from Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc. to MMM Holdings, Inc.

Private Operational Fixed Microwave Service:

901416 Consent to the transfer of control of LIN Central Broadcasting Corp., Call Sign WNEM522, from Eugene J. McCarthy, Trustee for the Benefit of MMM Holdings, Inc. to MMM Holdings, Inc.

These applications will be available for public inspection in the Domestic Facilities Division Public Reference Room, Room 6220, 2025 M Street, N.W., Washington, D.C. during its normal operating hours. Copies of these documents may be obtained from International Transcription Services, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, Phone Number (202) 857-3800.

For further information, contact Fern Jarmulnek, Satellite Radio Branch, (202) 624-1624; Terry Reideler, Domestic Radio Branch, (202) 634-1773; or Jerry Franz, Private Radio Bureau, (202) 632-7125.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-133
through 89-281, inclusive

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.

ERRATA

Released: June 23, 1989

By the Chief, Allocations Branch:

On June 16, 1989, the Commission's Mass Media Bureau released a *Notice of Proposed Rule Making Order* (DA 89-628) in the above-captioned proceeding. Appendix B thereof is hereby revised to read as follows:

23. MM Docket No. 89-155

228 CP KDCZ	DELTA JUNCTION AK 64-03-42 145-41-15 Delta Communications, Inc. P.O. Box 507 Delta Junction, AK 99737

52. MM Docket No. 89-184

240 CP KINQ	FAIRBANKS AK 64-51-49 147-45-06 The Great Alaska Elec. Radio Co., Inc. 4600 Dale Road Fairbanks, AK 99701

131. MM Docket No. 89-263

288 LIC KBZE	SECURITY CO 38-44-40 104-51-41 Optima Communications, Inc. 1608 Corcoran St., NW Washington, DC 20009-3004

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY
Revisions to Tariff F.C.C. No. 40

Transmittal No. 980

MEMORANDUM OPINION AND ORDER

Adopted: June 22, 1989; Released: June 23, 1989

By the Chief, Common Carrier Bureau:

1. By the captioned tariff filing New England Telephone and Telegraph Company (NET) proposes to provide DS3 service to Burlington Telephone d.b.a. Long Distance North (LDN) in Boston, Massachusetts. NET proposes to offer this service as an individual Specialized Serving Arrangement under Section 12 of its access service tariff and has filed individual case basis (ICB) rates for the service. NET states that it developed the rates and charges for the captioned filing using a consistent ratemaking methodology and that it is proposing the same rate it is charging another customer for the same service on the same route.[1] In addition, NET states that the customer may order an additional five DS3 services under this filing.[2] NET's general rate structure for DS3 service became effective April 1, 1989. This transmittal is scheduled to become effective June 25, 1989.

2. On April 11, 1989, Teleport Communications Group (TCG) filed a petition to reject the captioned filing. TCG contends that the proposed ICB rate should be rejected because it would unjustifiably discriminate among customers. TCG notes that NET proposes to charge LDN a rate different from the rate set in its general tariff filing and concludes that this would, in effect, nullify NET's newly effective general rates. TCG Petition at 2-3. Moreover, TCG argues, NET's sole justification for the proposed rate -- that NET believes that its new customer should enjoy the same rate as another customer -- does not rise to the level of a legal justification for disparate rates. TCG states that customers are always at risk that a carrier's tariff may supersede agreed-upon rates and that in any event the parties had ample notice of the pendency of the investigation of the lawfulness of ICB rates in Docket 88-136.[3] TCG also argues that the fact that the proposed ICB rates were filed four days before the effective date of NET's general DS3 tariff does not support allowing the proposed ICB tariff to become effective because the timing of the tariff filing was entirely within NET's control. *Id.* at 3.

3. TCG also contends that the proposed route-specific rate would violate Section 69.3(e)(7) of the Commission's Rules, 47 C.F.R. § 69.3(e)(7),[4] and Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).[5] Beyond this, TCG asserts, the logical extension of NET's argument would allow different pricing for every permutation of point-to-point DS3 service which NET currently provides under ICB pricing. *Id.* at 4.

4. NET argues in response that its filing represents an attempt to treat similarly situated customers in a nondiscriminatory manner. NET states that the services provided the two customers are virtually identical. In addition, NET notes, its general rates were not effective when the ICB rate was negotiated and it was not certain that those rates would be permitted to become effective as scheduled. NET Reply at 2. NET seeks to assure the Bureau that the instant filing was not intended to evade the general tariff rate structure and that customers that did not accept ICB rates prior to the April 1, 1989, effective date of NET's tariff will be served at the generally applicable tariff rate. *Id.* at 3.

5. NET also states that it is prepared to address the reasonableness of "grandfathering" existing ICB services in the context of the investigation in Docket 88-136 and that this issue need not be addressed here. Finally, NET asserts that its proposed ICB rate does not constitute the deaveraging of access rate elements inasmuch as prior to April 1, 1989, all DS3 arrangements were offered by NET pursuant to Section 12 of its tariff as specialized serving arrangements. NET concludes that if TCG's position were correct, all ICBs filed to date would have been rejected by the Commission. *Id.* at 4.

6. We conclude that NET's proposed ICB filing must be rejected as a patent violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), which prohibits unjust or unreasonable discrimination in the rates and charges assessed by a carrier for like communications services. As we have noted, NET now has a general tariff rate in effect for DS3 service. Although we have allowed ICB rates that were in effect prior to the effective date of carriers' general DS3 rates to remain in effect,[6] NET has not provided adequate justification for the provision of service at an individual case basis rate when it has in effect a general tariff for DS3 service which clearly applies to the service ordered by the customer.

7. Accordingly, IT IS ORDERED that New England Telephone and Telegraph Company Tariff F.C.C. No. 40, Transmittal No. 980 IS REJECTED.

8. IT IS FURTHER ORDERED that the petition to reject filed by Teleport Communications Group, Inc., IS GRANTED.

9. IT IS FURTHER ORDERED that New England Telephone and Telegraph Company SHALL FILE tariff revisions to remove the rejected material not later than five days from release of this Order to be effective on not less than one day's notice. For this purpose, Special Permission No. 89-436 is assigned and Section 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] NET Tr. No. 980, Description and Justification (D&J) at 1. NET notes that it filed the earlier ICB case under Transmittal No. 949. That transmittal became effective December 1, 1988, and was, along with a number of other filings of other carriers, made subject to the ongoing investigation in CC Docket No. 88-136. *See* Ameritech Operating Companies, DA 88-1776, released Nov. 14, 1988 (Com.Car.Bur.).

[2] *Id.*

[3] *See* Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (Com.Car.Bur. 1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (Com.Car.Bur. 1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, 4 FCC Rcd 846; Second Supplemental Order Designating Issues for Investigation, DA 89-529, released May 11, 1989 (Com.Car.Bur.).

[4] Section 69.3(e)(7) prohibits a carrier from filing rates for any access element that is disaggregated or deaveraged within a study area that is used for purposes of jurisdictional separations.

[5] Section 202(a) prohibits any unjust or unreasonable discrimination in charges for like communication services.

[6] *See* Annual 1989 Access Tariff Filing, 4 FCC Rcd 3638, 3696-97 (Com.Car.Bur. 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-43

In the Matter of

NEW JERSEY BELL TELEPHONE COMPANY
Tariff F.C.C. No. 38

Transmittal No. 474

Proposed Revisions To Establish Rates and Regulations for Local Packet Switching Service

MEMORANDUM OPINION AND ORDER

Adopted: June 6, 1989; Released: July 5, 1989

By the Commission: Commissioner Dennis concurring in the result.

I. INTRODUCTION

1. On June 19, 1985, New Jersey Bell Telephone Company (New Jersey Bell) filed the above-captioned transmittal to market packet switching services. New Jersey Bell filed the tariff revisions pursuant to a Commission Order providing that, as long as certain conditions were met, certain common carriers could offer protocol conversion services without the need to form separate subsidiaries.[1] GTE Telenet Communications Corporation (Telenet) and Tymnet, Inc. (Tymnet), who both offer protocol conversion and packet switching services to the public, filed petitions to reject or suspend the proposed tariff revisions on July 15, 1985. Subsequently, the Common Carrier Bureau initiated an investigation to consider issues relating to the cost support provided with the revisions.[2]

2. By this Order, and for the reasons given below, this Commission terminates the above-captioned investigation. We find that the circumstances which originally prompted the Bureau to initiate this investigation are no longer present, and that, therefore, it is no longer necessary or appropriate to seek to resolve the issues designated for investigation.

II. BACKGROUND

3. In the *Second Computer Inquiry*,[3] this Commission required the Bell Operating Companies (BOCs) to provide enhanced computer services through separate subsidiaries. We subsequently granted a waiver of this requirement in our *Protocol Waiver Order*, limiting the waiver by imposing several conditions.[4] Essentially, we required the BOCs to (1) provide an accounting plan to segregate nonregulated activity costs; (2) take inter-office channels on the same terms and conditions as their competitors when offering enhanced services; (3) include in their packet service rate structures a network utilization rate element (NURE) to charge customers discretely for network inefficiencies imposed by the provision of protocol conversion; and (4) provide end users with equal access to the protocol conversion offerings of the BOCs and other service providers. *Id.*

4. New Jersey Bell was the first BOC which sought to satisfy these conditions by filing Transmittal 474 in June 1985, proposing to establish a Local Public Data Network (LPDN) service, a packet switched service with protocol conversion capabilities. The tariff established charges for the regulated packet switching service. The service was to be provided between points within the State of New Jersey. Telenet and Tymnet both filed petitions against the proposed tariff, alleging that New Jersey Bell's cost support data were deficient and that New Jersey Bell's proposed rates were unlawfully low and predatory.

5. The Common Carrier Bureau instituted CC Docket No. 86-43 to examine questions relating to the cost data which New Jersey Bell filed in support of its tariff, with particular emphasis on whether the rates which New Jersey Bell filed were unreasonably low. New Jersey Bell was also required to submit to the Bureau quarterly reports regarding the revenues, expenses, demand, and other aspects of the LPDN service. In April 1986, New Jersey Bell filed revisions to its original tariff increasing slightly the rates for the LPDN service. Telenet and Tymnet again filed petitions against these tariffs. In an Order released June 23, 1986, the Bureau designated the revisions for investigation and consolidated that investigation into the Docket 86-43 investigation.[5] Subsequently, the Bell Atlantic Companies (Bell Atlantic), on behalf of New Jersey Bell, filed Transmittal 239 on April 29, 1988, further revising the rates and data submitted originally in New Jersey Bell's Transmittal 474. No party opposed Bell Atlantic's Transmittal 239 and it became effective, without Bureau action, on July 16, 1988.[6]

III. DISCUSSION

6. Since this investigation was initiated, Bell Atlantic has revised the challenged rates and data. The initial question we must address, then, is whether Bell Atlantic's Transmittal 239, filed on behalf of New Jersey Bell, has changed the circumstances which prompted the investigation in a manner which makes unnecessary any further attempt to resolve the issues initially set for investigation. We believe that it does. Under Section 203(b) of the Communications Act, 47 U.S.C. § 203(b), a carrier may change provisions in its tariff so long as it gives notice to this Commission and the public. Bell Atlantic filed Transmittal 239 on April 29, 1988, in accordance with Section 61.58 of our Rules, 47 C.F.R. § 61.58. No parties opposed the revisions proposed in that filing and it became effective as scheduled on July 16, 1988, without Bureau action. The provisions contained in Transmittal 239 have thus replaced the provisions in New Jersey Bell's Transmittal 474.

7. We believe this changed circumstance makes it unnecessary and inadvisable to seek to resolve the issues designated with regard to Transmittal 474. It is well-settled that the ultimate effectiveness of newly filed tariffs does not preclude this Commission from completing a pending investigation of rates charged under tariffs that have been superseded.[7] We may still have interests to be decided

regarding the investigated rates, including whether to order a refund if the investigated rates are found to be unlawfully high, or whether significant questions of law and policy need to be resolved as to the old rates in order to evaluate the new ones. *See AT & T Decision*. Conversely, this Commission has the discretion to terminate any investigation if we reasonably determine that there is no longer any reason for continuing such investigation.

8. We conclude that the investigation of New Jersey Bell Transmittal 474 falls into the latter category. For example, Telenet and Tymnet alleged that the local packet switching rates established in New Jersey Bell's Transmittal 474 were unlawfully low and predatory. Thus, the ultimate purpose of the investigation was not to determine whether the rates under investigation were unlawfully high so that the carrier was required to decrease them and issue refunds or be required to give other retroactive relief. Rather, the purpose was to determine whether those rates were unlawfully low so that the carrier should be required to increase them. Transmittal 239 increased local packet switching rates,[8] and Telenet and Tymnet, after opposing two previous packet switching rate proposals, chose not to oppose Transmittal 239. This indicates that the competitors do not believe the currently effective rates are predatory.

9. Consequently, we see no reason to devote further Commission resources to the investigation of these superseded rates, especially in view of the fact that there is no possibility of retroactive relief, such as refunds. Nor are there any significant questions of law or policy that we need to resolve regarding New Jersey Bell Transmittal 474. Accordingly, we conclude that we should terminate our investigation of that transmittal in CC Docket No. 86-43.

IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED that the investigation of New Jersey Bell Telephone Company, Tariff F.C.C. No. 38, Transmittal No. 474, CC Docket 86-43, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* Petitions for Waiver of Section 64.702 of the Commission's Rules and Regulations, 100 FCC 2d 1057 (1985) (*Protocol Waiver Order*).

[2] New Jersey Bell Telephone Company, Revisions to Tariff F.C.C. No. 38 To Establish Rates and Regulations for Local Packet Switching Service, CC Docket No. 86-43, Mimeo No. 2381, released Feb. 4, 1986 (*Designation Order*).

[3] *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (*Final Decision*), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 938 (1983) (*Second Computer Inquiry*).

[4] *See generally Protocol Waiver Order*, 100 FCC 2d at 1093-1112.

[5] New Jersey Bell Telephone Company and Bell Atlantic Telephone Companies, Revisions to Tariff F.C.C. No. 1 To Establish Rates and Regulations for Local Packet Switching Service, Transmittal Nos. 52 and 53, Mimeo No. 5305, released June 23, 1986 (*June 23 Order*).

[6] In view of the conclusions reached herein, we find it unnecessary to summarize the arguments presented in the pleadings filed by the parties involved in this proceeding.

[7] *See, e.g.*, American Tel. & Tel. Co. v. FCC, 487 F.2d 865, 880 (2d Cir. 1973) (*AT&T Decision*).

[8] Bell Atlantic's LPDN quarterly reports show that demand and revenue have continued to increase since the filing of Transmittal 239. For example, direct access ports increased from 90 in April 1988 to 117 in September 1988. Also, packet switch ports increased from 49 to 67 over the same period. Total packet switch revenues in New Jersey have increased by about 18 percent from the first quarter to the third quarter of 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MUTUAL OF OMAHA
INSURANCE COMPANY
Complainant,

v. File Nos. E-87-57
and E-89-145

AMERICAN TELEPHONE
AND TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: June 19, 1989; Released: July 5, 1989

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a Joint Motion filed on June 14, 1989 by Mutual of Omaha Insurance Company (Mutual) and American Telephone and Telegraph Company (AT&T), requesting that we dismiss in part the above-captioned proceeding and authorize the parties' agreement to settle certain issues raised in the matter. For the reasons set forth below, the Joint Motion is granted.

2. This proceeding was initiated by a formal complaint filed by Mutual against AT&T on April 24, 1987, alleging that AT&T's rates for 56 kilobits per second (kbps) Data Digital Service (DDS) were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). AT&T denied such allegations and moved to dismiss the complaint. On April 13, 1988, the Common Carrier Bureau (Bureau) released an order in the proceeding in which it granted AT&T's motion to dismiss in part and denied it in part. *Aetna Life Insurance Company et al. v. AT & T*, DA-88-462 (released April 13, 1988). On May 16, 1988, Mutual filed an Application for Review of the Bureau's order. AT&T filed an opposition thereto on May 31, 1988. On April 24, 1989, Mutual filed a further complaint (File No. E-89-145) alleging that for periods not covered by Mutual's prior complaint, AT&T's rates for 56 Kbps DDS under Tariff No. 9 are unjust and unreasonable.

3. Subsequently, the parties entered into settlement negotiations with the cooperation of the Enforcement Division. As a result of these negotiations, the parties reached a partial settlement that resolves all issues with respect to AT&T's 56 kbps DDS rates for the period April 24, 1985 to the date of the settlement agreement, while leaving open the pending application for review on the statute of limitations issue for the period prior to April 24, 1985.

4. Mutual and AT&T state that dismissal of the complaint will affect no other party and will serve the public interest by eliminating the need for further litigation of significant issues raised by the complaint.

5. On the basis of the statements contained in the parties' motion, we conclude that there are no longer issues in controversy concerning AT&T's 56 kbps rates for the period April 24, 1985 through the date of the parties' settlement agreement and that proceedings with respect to such issues should be terminated.

6. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Authorize Settlement and Dismiss Complaints in Part filed by Mutual of Omaha Insurance Company and American Telephone and Telegraph Company IS GRANTED.

7. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE in the manner and to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Acting Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS, INC.
Complainant,

v.

CENTRAL TELEPHONE COMPANY OF FLORIDA,	File Nos. E-87-101
CENTRAL TELEPHONE COMPANY OF ILLINOIS,	E-87-102
CENTRAL TELEPHONE COMPANY OF MINNESOTA,	E-87-103
CENTRAL TELEPHONE COMPANY OF NEVADA,	E-87-104
CENTRAL TELEPHONE COMPANY OF NORTH CAROLINA,	E-87-105
CENTRAL TELEPHONE COMPANY OF OHIO, and	E-87-66
CENTRAL TELEPHONE COMPANY OF VIRGINIA	E-87-100

Defendants.

ORDER

Adopted: June 21, 1989; Released: July 5, 1989

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On June 30, AT&T Communications (AT&T) filed formal complaints against, *inter alia*, Central Telephone Company of Florida, Central Telephone Company of Illinois, Central Telephone Company of Minnesota, Central Telephone Company of Nevada, Central Telephone Company of North Carolina, Central Telephone Company of Ohio and Central Telephone Company of Virginia (collectively, "Centel"). The complaints alleged certain statutory and tariff violations associated with defendant's billing and collection rates for the period July 1, 1985, to December 31, 1986.

2. The parties have conducted discussions, including consultations with members of the Enforcement Division, aimed at settling the complaints. As a result of these negotiations, a mutually agreeable settlement of all pending controversies between the parties was reached. On June 20, 1989, counsel for AT&T and Centel filed a joint motion seeking dismissal of the complaints with prejudice and authorization of their settlement agreement. The parties state that dismissal of these complaints will affect no other parties and will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and this Commission.

3. On the basis of the statements contained in the parties' joint motion, we conclude that there are no longer issues in controversy and the processing should be terminated.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss filed by AT&T and Centel IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION — File No. ENF-89-04

Petition for Declaratory Ruling and Cease and Desist Order concerning Blocking of Interim 800 Service Interexchange Access

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 1989; Released: July 5, 1989

By the Chief, Common Carrier Bureau:

1. The Competitive Telecommunications Association (CompTel) has petitioned for a declaratory ruling that "blocking" the use of competitive 800 access services for the completion of interexchange telephone calls is an unlawful practice.[1] CompTel also seeks an order directing all offending carriers to cease and desist from engaging in such practices.[2] For reasons discussed below, we deny the Petition.

2. CompTel, an industry association of interexchange telecommunications carriers (IXCs), states that, since early 1988, several of its member companies have obtained interim 800 access service numbers assigned through the NXX numbering plan administered by Bell Communications Research (Bellcore).[3] Under some configurations, a member company's customers may dial the 800 number of an IXC and be connected by the IXC's operator who completes the call. In other cases, after dialing the 800 number, callers can key in a travel card number to receive a second dial tone and then complete their calls. CompTel states that it has received complaints from its members that, in many instances, their customers' 800 service calls cannot be completed from public and semi-public telephones. According to CompTel, its members' 800 access numbers are not recognized on a ubiquitous basis and many calls from public and semi-public telephone locations across the country are being blocked.[4] CompTel states that some such telephones will not accept 800 NXX-XXXX calls while calls dialed to AT&T's numbers for comparable service are accepted and completed. Further, in some cases when customers successfully dialed an IXC's 800 NXX-XXXX number, they were not able to outpulse any digits on receiving the second dial tone according to CompTel.[5] Although acknowledging that LECs have been responsive to specific requests concerning public or semi-public telephones which they own, CompTel maintains that an *ad hoc* approach is not a reasonable long-term solution. It asserts that all common carriers must provide access to IXCs' services from telephones LECs control and that the blocking of 800 service calls violates Sections 201(b) and 202(a) of the Communications Act. CompTel asserts that such blocking also violates equal access provisions of the Modification of Final Judgment (*MFJ*)[6] and Commission implementation policies relating thereto.[7] According to CompTel, only through issuance of a declaratory ruling can the Commission ensure that the blocking practices that IXCs and their customers have experienced are stopped on a nationwide basis. CompTel maintains that the Commission should order all common carriers to immediately cease and desist all blocking of interim 800 access service calls.

3. All parties filing comments in this matter, other than Teleconnect which is a member of CompTel, oppose issuance of the order that CompTel requests. Some LECs maintain that CompTel has not identified a single instance of improper blocking, much less proven that a wide-spread problem exists.[8] Others maintain that CompTel has failed to allege facts specific enough to show controversy or uncertainty, and therefore provided no basis for issuance of a declaratory order under Section 1.2 of the Commission's rules[9] or a cease and desist order.[10] LECs generally assert that they deliver 800 calls from their pay telephones to any IXC providing 800 service in the area and are willing to work with CompTel's members to correct any problems identified that are specific to and within the control of a particular LEC.[11] The LECs and their associations state that 800 access services are offered in the tariffs of all LECs and will be furnished on receipt of an order for service.[12]

4. USTA urges rejection of the Petition as overbroad and unnecessary. It states that 800 traffic should be delivered when requested by any IXC providing 800 service in the LEC's serving area so long as the LEC has the technical capability to furnish the service.[13] While the Bell Operating Companies are required to provide interim 800 access service by the *MFJ*, USTA and OPASTCO note that small independent LECs are required to provide access service to IXCs only to the extent such services are provided to AT&T.[14]

5. The Independents state that they do not understand the relationship between pay telephones and blocking asserted by CompTel. They maintain that once NXX information is programmed into the switching equipment, the nature of the customer premises equipment (CPE) is transparent to the switching function and they cannot selectively block interim 800 traffic involving only pay telephones.[15] USTA states that the inability of some customers to complete 800 calls cannot necessarily be attributed to blocking by LECs. It notes that customer-owned coin-operated telephones are beyond the control of LECs and asserts that public telephones operated by IXCs are not likely to complete 800 calls of competing IXCs.[16] To the extent that non-telephone company owners of pay telephones are able to block traffic, the Independents and OPASTCO suggest that CompTel's complaint is with those owners and not with the LECs.[17]

6. We recently determined that certain practices of some participants in the operator services providers (OSP) industry were in violation of Section 201(b) of the Act when calls were blocked to competitors of telephones presubscribed to such OSP's service. *Telecommunications Research and Action Center v. Central Corporation, et al.*, 4 FCC Rcd 2157, 2159, 2160 at n.6, 20 (Common Carrier Bureau, 1989), *application for review pending*.[18] While the complaints there addressed "0+" calls, we noted that the issues were equally applicable to "1+" calls, including "calls from coin operated telephones which are paid in cash, so-called 'sent paid' telephone calls." *Id.* at 2120 n.4.

Thus, our position in this regard is abundantly clear: absent grant of a waiver, it is an unjust and unreasonable practice in violation of Section 201(b) for any service provider to engage in call blocking.[19] This includes the blocking of the use of 800 service to access the provider of choice, as well as 950 and 10XXX access.

7. Nevertheless, the determination of whether to issue a declaratory ruling under 47 C.F.R. § 1.2 in a particular proceeding is a matter within the Commission's discretion and is not mandatory.[20] We decline to do so here. We are not persuaded that the declaratory ruling sought by CompTel is either necessary or desirable. Neither CompTel nor Teleconnect has provided specific evidence that any LEC is, in fact, blocking interim 800 services of IXCs or violating any provision of the Communications Act or of the Commission's rules or orders, much less concrete evidence that LECs generally are unlawfully blocking interim 800 services of IXCs. Indeed, the commenting LECs generally state that it is their practice to deliver 800 calls from their pay telephones to any IXC providing 800 service in the area and that they are unaware of any instances in which CompTel members have not received 800 calls from their pay telephones. *See, e.g.*, Opposition of the Ameritech Operating Companies at 2. Opposition of Bell Atlantic at 1-2. Accordingly, issuance of neither the requested declaratory order nor a cease and desist order would be appropriate here in the absence of clearly developed facts. *American Network, Inc.*, 4 FCC Rcd 550, 551 (1989). Because the causes of blocking are varied, identification and resolution of blocking problems, if any, may require specific solutions between the relevant parties involved in any particular case. To the extent any carrier subject to the Act is involved in call blocking, a complaint may be filed against the carrier pursuant to Section 208 of the Act.

8. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules and Regulations, 47 C.F.R. § 0.291, that the "Petition for Declaratory Ruling and Order to Cease and Desist" filed by the Competitive Telecommunications Association on December 29, 1988, IS DENIED.

9. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Petition for Declaratory Ruling and an Order to Cease and Desist, filed by CompTel on December 29, 1988 (Petition). 800 service is an interexchange service in which the called party agrees in advance to pay for incoming calls from designated locations. The service gives businesses and other organizations a means of providing potential customers, or other persons with whom they wish to communicate, a convenient and free method of contacting them. Bell Operating Companies and other local exchange companies (LECs) currently offer to provide 800 access service to interexchange carriers (IXCs) through the so-called "NXX" screening methodology. Under this system, LECs identify the carrier to which 800 calls should be routed by reading the three digits that immediately follow the 800 prefix of the dialed number (the "NXX" digits).

[2] On February 2, 1989, we invited interested persons to file comments on CompTel's Petition. Public Notice, 4 FCC Rcd 1288 (1989). Comments in support of the Petition were filed by Teleconnect Company (Teleconnect). Comments in opposition to the Petition were timely filed by Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc. (the Ameritech Operating Companies), The Bell Telephone Company of Pennsylvania, The Diamond State Telephone Company, the four Chesapeake and Potomac telephone companies, and New Jersey Bell Telephone Company (Bell Atlantic), New England Telephone and Telegraph Company and New York Telephone Company (NYNEX Telephone Companies) Pacific Bell and Nevada Bell telephone companies, Contel Corporation (Contel), the United States Telephone Association (USTA), the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), and by Granite State Telephone Company, Merrimack County Telephone Company, Elkhart Telephone Company and Telephone Electronics Corporation (the Independents). The Independents, CompTel, and Teleconnect timely filed reply comments on or about March 21, 1989.

[3] Interim 800 service is the current method by which LECs provide originating 800 access for IXCs, pending implementation of an alternative data base system which the Commission has approved. *See* Provision of Access for 800 Service, 4 FCC Rcd 2824 (1989) (an LEC may implement a data base system for competitive 800 service access provided it continues to offer NXX system as well). *See also* Provision of Access for 800 Service, Notice of Proposed Rule Making, CC Docket No. 86-10, 102 FCC 2d 1387, 1395-98 (1986) (Rule Making on interim 800 access is unnecessary), *reconsid. denied*, Provision of Access for 800 Service, Supplemental Notice of Proposed Rule Making, 3 FCC Rcd 721, 727 at n.3 (1988).

[4] Petition at 4.

[5] *Id.* at 5. CompTel states that deactivation of the tone pad on the telephone instrument prevents customers from using the second dial tone which is necessary as part of some IXCs' 800 services. Reply Comments at 2.

[6] United States v. AT&T, 552 F. Supp. 131 (D.C.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983) (*MFJ*).

[7] Petition at 6-13. It is asserted that blocking also violates the Commission's policies favoring the resale and shared use of common carrier services. Teleconnect comments at 10-11.

[8] *See e.g.*, Comments of the NYNEX Telephone Companies at 2.

[9] Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, provides as follows:

> The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

[10] *See, e.g.*, Opposition of the Ameritech Operating Companies; reply comments of the Independents.

[11] *See, e.g.*, Bell Atlantic opposition at 2; Pacific Bell and Nevada Bell opposition at 2.

[12] *See, e.g.*, USTA comments at 3-4; comments and reply comments of the Independents; opposition of Contel at 2. Teleconnect states that the failure to obtain access facilities is

not the relevant issue but that the problem is that, once facilities are obtained by an IXC, access to its services by the end user allegedly is blocked by the LEC carrier. Reply Comments of Teleconnect at 6.

[13] USTA Comments at 2.

[14] *Id.*; Comments of OPASTCO at 3, *citing* MTS and WATS Market Structure, 100 FCC 2d 860, 877 (1985).

[15] Comments of the Independents at 5.

[16] Comments of USTA at 4.

[17] Comments of the Independents at 5; Comments of OPASTCO at 5.

[18] Such participants previously had been referred to as alternative operator services (AOS).

[19] We are aware that some service providers maintain it is necessary to block access to services from telephones presubscribed to that service provider to prevent fraudulent use of the network. *See e.g.*, US Sprint Communications Company v. Bell Telephone Company of Pennsylvania, et al., File Nos. E-89-111 through E-89-125, E-89-127; National Telephone Services, et al., Petitions for Waivers of Limited Portions of the Call Blocking Prohibition, ENF-89-08. Our action herein is not intended to prejudge issues there under consideration. *See also* US Sprint v. Southern New England Telephone Co., 4 FCC Rcd 3568 (1989).

[20] 47 C.F.R. § 1.2 provides, in pertinent part, that the Commission " *may* . . . issue a declaratory ruling terminating a controversy or removing uncertainty." (emphasis added)

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-301

In the Matter of

Amendment of Section 73.202(b),	RM-6672
Table of Allotments,	RM-6736
FM Broadcast Stations.	
(Carthage and Webb City, Missouri)	

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: June 16, 1989; Released: July 6, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Carthage Broadcasting Company (petitioner), requesting the substitution of FM Channel 236C2 for Channel 285A at Carthage, Missouri.[1] Petitioner also requests modification of its license for Station KRGK(FM), to specify operation on the higher class channel.

2. Channel 236C2 can be allotted to Carthage, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 236A is deleted from Webb City, Missouri.[2] Petitioner has proposed the substitution of Channel 250A for Channel 236A at Webb City. The proposed substitution at Webb City can be accomplished in compliance with the minimum distance separation requirements at the current site of Station KKLL-FM.[3] Thus, we shall issue an Order to Show Cause to Don and Gail Stubblefield, the licensees of Station KKLL-FM. It is also necessary to impose a site restriction 13.9 kilometers (8.6 miles) north on Channel 236C2 at Carthage. The site restriction will prevent a conflict with Station KJEM, Channel 237A, Seligman, Missouri. In consideration of the above, we shall propose to modify petitioner's license to specify operation on Channel 236C2. However, in conformity with Commission precedent, should another interest in the Carthage proposal be expressed, the modification could not be made unless at least one additional equivalent channel is available to accommodate other expressions of interest. *See* Section 1.420(g) of the Commission's Rules.

3. Whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, we require that the proponent of the new allotment make a commitment that it will reimburse the affected station for the costs incurred in changing frequencies. Petitioner has indicated its intention to reimburse Station KKLL-FM for reasonable and necessary expenses for the frequency change.

4. In view of the fact that the proposed allotment could provide a first wide coverage area station at Carthage, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Carthage, Missouri	285A	236C2
Webb City, Missouri	236A	250A

5. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Don and Gail Stubblefield, licensee of Station KKLL(FM), Webb City, Missouri, SHALL SHOW CAUSE why their license should not be modified to specify operation on Channel 250A in lieu of Channel 236A.

6. Pursuant to Section 1.87 of the Commission's Rules, Don and Gail Stubblefield may, not later than **September 7, 1989,** file a written statement showing with particularity why their license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Don and Gail Stubblefield, to furnish additional information. If Don and Gail Stubblefield raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Don and Gail Stubblefield will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Don and Gail Stubblefield
Radio Station KKLL-FM
Group 5, Box 136
Joplin, Missouri 64801

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **September 7, 1989,** and reply comments on or before **September 22, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Allan G. Moskowitz
Kaye, Scholer, Fierman,
Hays & Handler
901 - 15th Street, N.W.
Suite 1100
Washington, D.C. 20005
(Counsel to the petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Pursuant to *Report and Order* in MM Docket 87-474, released January 18, 1988, the license for Station KRGK(FM) was modified to specify operation on Channel 250A in lieu of Channel 285A.

[2] The coordinates for Channel 236C2 are 37-17-54 and 94-21-49.

[3] The coordinates for Channel 250A at Webb City are 37-06-11 and 94-24-11.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-376

In the Matter of

Amendment of Section 73.202(b),	RM-4988
Table of Allotments,	RM-5378
FM Broadcast Stations.	
(Ponte Vedra Beach, Florida)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 15, 1989; Released: July 6, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for reconsideration filed by Emision de Radio Balmaseda, Inc. ("Emision de Radio") directed against the *Memorandum Opinion and Order* in this proceeding. 4 FCC Rcd 843 (1989).[1] General Broadcasting of Florida, Inc. ("General Broadcasting"), licensee of Station WHLY, Channel 294C1, Leesburg, Florida, filed an opposition to the petition for reconsideration and Emision de Radio filed a reply to the opposition. Emision de Radio also filed a motion for stay and General Broadcasting filed an opposition to the motion for stay. We will grant the Emision de Radio petition for reconsideration to the extent of substituting Channel 293A in lieu of Channel 227A at Ponte Vedra Beach, Florida.[2] We will provide a background and the reasons for this action below.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by Emision de Radio to allot Channel 293A to Ponte Vedra Beach, Florida. In response to the *Notice of Proposed Rule Making*, General Broadcasting filed a counterproposal proposing the allotment of Channel 227A to Ponte Vedra Beach in lieu of Channel 293A. In its counterproposal, General Broadcasting stated that the proposed Channel 293A allotment would preclude grant of its application to maintain full Class C status for Station WHLY (File No. BPH-860310II). The *Report and Order*, 2 FCC Rcd 1182 (1987), denied the counterproposal advanced by General Broadcasting and allotted Channel 293A to Ponte Vedra Beach as originally proposed. The stated reason for that denial was that allotting Channel 227A to Ponte Vedra Beach would preclude a Channel 227A allotment to nearby Baldwin, Florida as a first local service. General Broadcasting filed a petition for reconsideration directed against that action.

3. In the *Memorandum Opinion and Order*, we granted the General Broadcasting petition for reconsideration. In doing so, we conceded that we did not afford General Broadcasting the required notice that its Channel 227A counterproposal for Ponte Vedra Beach could be precluded by a petition for rule making proposing Channel 287A for Baldwin. We specifically stated that there was no notice to the public or any interested party that a Channel 287A petition for rule making for Baldwin was pending or that we were considering Channel 227A to Baldwin as an alternative channel. This procedure was not consistent with the statutory obligation to afford interested parties a meaningful opportunity to comment on and participate in a rule making proceeding. After a further review of timely filed submissions in this proceeding, we determined that the appropriate allotment to Ponte Vedra Beach was Channel 227A. The 14 applicants for Channel 293A at Ponte Vedra Beach were permitted to amend their application to specify Channel 227A without loss of cut-off protection. It was specifically noted that this allotment would permit grant of the Station WHLY application to maintain Class C status. Emision de Radio, an applicant for Channel 293A at Ponte Vedra Beach, filed its petition for reconsideration directed against that action.

4. In support of its petition for reconsideration, Emision de Radio contends that Channel 293A at Ponte Vedra Beach is a "more efficient use of scarce radio spectrum," that use of Channel 227A at Ponte Vedra Beach would preclude the only upgrade possibility by Station WLKC, St. Marys, Georgia, that a full Class C allotment on Channel 294 at Leesburg precludes use of Channel 295C1 at Cross City, Florida, and that General Broadcasting has "abandoned" its efforts to attain full Class C status for Station WHLY thereby negating any reason to allot Channel 227A to Ponte Vedra Beach.

DISCUSSION

5. After careful consideration of this matter, we will grant the Emision de Radio petition for reconsideration to the extent of substituting Channel 293A in lieu of Channel 227A at Ponte Vedra Beach. In taking this action, we note that on May 10, 1988, General Broadcasting amended its application to maintain full Class C status (File No. BPH-860310II) to specify instead Class C1 facilities. This application was granted on June 7, 1988. As a result of that action, the Table of FM Allotments is amended to reflect a Class C1 allotment. *See Reclassification of FM Facilities Pursuant to Broadcast Docket No. 80-90*, 2 FCC Rcd 2124 (1987). After the Table is amended, the prescribed procedure for General Broadcasting to attain Class C status at Station WHLY would be to file a petition for rule making. General Broadcasting has not done so. In fact, in its Petition for Leave to Amend in BPH-860310II, General Broadcasting specifically stated that its amendment specifying Class C1 facilities would end "litigation surrounding retention of General's Class C status." As a result, we find that General Broadcasting is no longer aggrieved by any allotment which we may make in Ponte Vedra Beach.

6. We believe that allotting Channel 293A to Ponte Vedra Beach will provide the greatest public interest benefit. This will avoid the need for the 14 applicants for the original Channel 293A allotment to amend their applications. Moreover, we will not have to consider competing proposals to allot Channel 287A at Fernandina Beach and Baldwin, Florida. Instead, we will be able to consider the proposed allotment of Channel 287A to Fernandina Beach, Florida, in MM Docket No. 86-487, and, in a separate proceeding in MM Docket No. 87-77,

we will also be able to consider in Channel 227A allotment to Baldwin, Florida, along with the counterproposal for a Channel 227C2 upgrade at St. Marys, Georgia.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 21, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Ponte Vedra Beach, Florida	293A

8. IT IS FURTHER ORDERED, That the aforementioned petition for reconsideration filed by Emision de Radio Balmaseda, Inc. IS GRANTED to the extent indicated above.

9. IT IS FURTHER ORDERED, That the motion for stay filed by Emision de Radio Balmaseda, Inc. IS DISMISSED.

10. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Casey Broadcasting Co., Inc. IS DISMISSED as moot.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice was given on March 15, 1989 (Report No. 1770).

[2] Casey Broadcasting Co., Inc., licensee of Station WLKC, Channel 228A, St. Marys, Georgia also filed a petition for reconsideration directed against the *Memorandum Opinion and Order*. In this regard, the action allotting Channel 227A to Ponte Vedra Beach precludes consideration of a Casey counterproposal to substitute Channel 227C2 in lieu of Channel 228A at St. Marys currently pending in MM Docket No. 87-77 involving the proposed allotment of Channel 227A to Baldwin, Florida. Inasmuch as we are removing the Channel 227A impediment at Ponte Vedra Beach to the proposed St. Marys upgrade, we are dismissing the Casey petition for reconsideration as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-319

In the Matter of

Amendment of Section 73.202(b),	RM-6247
Table of Allotments,	
FM Broadcast Stations.	
(Opelika, Alabama)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 16, 1989; Released: July 6, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 4226 (1988), issued in response to a petition filed by Ronald H. Livengood (petitioner), proposing the allotment of Channel 244A to Opelika, Alabama, as that community's first local FM service. Petitioner filed comments in response to the *Notice* reiterating his intention to apply for the channel, if allotted. Daniel S. Tankersley ("Tankersley") also filed supporting comments. Additionally, H.D. Norman ("Norman") filed informal comments.[1]

2. As indicated in the *Notice*, Channel 244A can be allotted to Opelika in conformity with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 3.9 kilometers (2.4 miles) east[2] of the community to avoid short-spacing to Station WMJJ(FM), Channel 243C, Birmingham, Alabama.[3]

3. In consideration of the above, we believe the public interest would be served by the instant proposal since it could provide a first local FM service to Opelika.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 21, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Opelika, Alabama	244A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 244A at Opelika, Alabama, will open on **August 22, 1989,** and close on **September 21, 1989.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Norman's comments were not filed in accordance with the requirements of Section 1.420(c) and (e) of the Commission's Rules. Moreover, they were not served on the petitioner. Thus, they will not be considered in this proceeding.

[2] Coordinates at the restricted site for Channel 244A are 32-38-11 and 85-20-44.

[3] Coordinates at the licensed site of Station WMJJ(FM) are 33-26-38 and 86-52-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-502

In the Matter of

Amendment of Section 73.202(b), RM-6449
Table of Allotments,
FM Broadcast Stations.
(Winnebago, Nebraska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 16, 1989; Released: July 6, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 6212 (1988), proposing the substitution of Channel 289C2 for Channel 289A at Winnebago, Nebraska, and the modification of Station KSUX's construction permit to specify the higher powered channel, at the request of Gary L. Violet (petitioner). Petitioner failed to file comments reiterating its intention to apply for Channel 289C2, if allotted.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's general policy to refrain from making allotments to a community absent such an expression of interest. Since no such interest has been expressed, we will dismiss petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition of Gary L. Violet requesting the substitution of Channel 289C2 for Channel 289A at Winnebago, Nebraska, and the modification of Station KSUX's construction permit to specify the higher powered channel, IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-302

In the Matter of

Amendment of Section 73.202(b), RM-6664
Table of Allotments,
FM Broadcast Stations.
(Beaver Springs, Pennsylvania)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 15, 1989; Released: July 6, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Susan A. Bernstein (petitioner), requesting the allotment of Channel 291A to Beaver Springs, Pennsylvania, as its first local FM service. Petitioner states that she will apply for the channel, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies ". . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to establish its status. Petitioner states that Beaver Springs is located in Snyder County and that it has a 1980 U.S. Census population of 725 persons. However, we were unable to confirm this fact.[1] Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Beaver Springs is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1983, *Cascade Village, Colorado*, 48 FR 19917 (1983) and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

3. We believe the public interest would be served by proposing the allotment of Channel 291A to Beaver Springs, Pennsylvania, since it could provide the area with its first local FM service, if it is ultimately found to be a "community" for allotment purposes. Channel 291A can be allotted to Beaver Springs in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.2 kilometers (3.2 miles) south to avoid a short-spacing to Station WZKZ, Channel 291B, Corning, New York, and to Station WHLM, Channel 293B, Bloomsburg, Pennsylvania.[2] Canadian concurrence is required before the channel can be allotted since Beaver Springs is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the place listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Beaver Springs, Pennsylvania	--	291A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 28, 1989,** and reply comments on or before **September 12, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Susan A. Bernstein
14 Spruce Street
Selingsgrove, Pennsylvania 17870
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We found no listing the U.S. Census for Beaver Springs. We note that Beaver Springs is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 825. However, Rand McNally apparently did not rely on Census data in making this determination.

[2] The coordinates for this allotment are North Latitude 40-42-04 and West Longitude 77-13-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-303

In the Matter of

Amendment of Section 73.606(b), RM-6661
Table of Allotments,
Television Broadcast Stations.
(Arcade, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 15, 1989; Released: July 6, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Robert Bennett (petitioner), requesting the allotment of UHF TV Channel 62 to Arcade, New York, as the community's first local television service. Petitioner states that it will apply for the channel, if allotted.[1]

2. Channel 62 can be allotted to Arcade in compliance with the Commission's minimum distance separation requirements with a site restriction of 15.2 kilometers (9.5 miles) east to avoid a short-spacing to a construction permit for Channel 48+ at Corning, New York, and to unused Channel 55 at Niagara Falls, Ontario, Canada.[2] Canadian concurrence in the allotment is required since Arcade is located within 400 kilometers (250 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 62 to Arcade, New York, since an interest has been expressed in providing the community with its first local television service. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Arcade, New York	–	62-

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 28, 1989,** and reply comments on or before **September 12, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert Bennett
P.O. Box 525
Buffalo, New York 14215
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will

be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] This allotment is not affected by the Commission's freeze on new television allotments since it not located within the minimum co-channel distance to any of the markets affected by the freeze. *See, Order,* RM-5811, 52 FR 28346, July 29, 1987.

[2] The coordinates for this allotment are North Latitude 42-28-44 and West Longitude 78-15-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-388

In the Matter of

Amendment of the Commission's
Rules for Rural Cellular Service

ORDER ON RECONSIDERATION OF SECOND REPORT AND ORDER

Adopted: May 31, 1989; Released: July 6, 1989

By the Commission:

INTRODUCTION

1. On April 7, 1987, we adopted a *Second Report and Order* [1] in this proceeding adopting rules on applications for unserved areas within Metropolitan Statistical Areas (MSAs). In the *Second Report and Order*, we allowed only licensees and permittees to file fill-in applications[2] for a period of five years from the date of the grant of the first construction permit in each MSA. We stated that this five year period for licensees and permittees to file applications to modify and expand their CGSAs would begin to run for both frequency blocks from the date of the first grant, regardless of whether that grant was to the wireline or the non-wireline applicant. In order to proceed with the initial cellular licensing process, we deferred adopting procedures for selecting a winner from a group of mutually exclusive applications for unserved areas filed after the expiration of the fill-in period. Several Petitions for Reconsideration[3] of the *Second Report and Order* have been filed. Two of the petitioners request that the Commission allow the filing of mutually exclusive applications in response to fill-in applications of permittees and licensees in the top 90 MSAs prior to the expiration of the five year period. One petitioner urges that we set a sixty day grace period for accepting wireline fill-in applications without competing applications after expiration of the five year period. Another requests that we establish a separate five year period for the second cellular licensee in an MSA, generally the non-wireline licensee, to modify its CGSA without competing applications being filed. Several petitioners ask us to clarify whether the "fence" between wireline and non-wireline cellular applications will apply for applications for unserved areas after the expiration of the five year period. Finally, some of the petitioners request that we establish a procedure for selecting among competing cellular applicants when mutually exclusive applications for any remaining unserved areas in an MSA can be filed after expiration of the five year fill-in period.

Notice of the Fill - in Policy

BACKGROUND

2. In a joint Petition for Reconsideration, Amery Telephone Company, Baldwin Telecom, Inc., and Hammond Telephone Company (Joint Petitioners),[4] contend that the Commission has not followed *Maxcell Telecom Plus, Inc. v. FCC*, 815 F. 2d 1551 (D.C. Cir. 1987) (*Maxcell*), in which the court ordered the Commission to reinstate *nunc pro tunc* a competing application filed by La Star Cellular Telephone Company (La Star) in response to the existing licensee's major amendment in a top-90 MSA; the Commission had dismissed it as untimely filed under its date certain filing policy. *See New Orleans, CGSA, Inc.*, FCC 85-209 (released May 6, 1985). According to the Joint Petitioners, the Court of Appeals concluded that the Commission had provided insufficient notice to non-licensee applicants like La Star that they were precluded from filing applications in response to a licensee's application to expand its CGSA into an unserved area of the MSA. In the Joint Petitioners' view, the court found that later attempts by the Commission to give notice were not effective, because the notices were issued long after the cut-off had passed to apply for the MSA that La Star wanted to serve. Joint Petitioners submit that, under *Maxcell*, a subsequent notice cannot correct an earlier defective notice because potential applicants, who in reliance upon the defective notice did not file applications for initial service in an MSA, are still foreclosed from applying. Similarly, argue the Joint Petitioners, the new rule announced in the *Second Report and Order*, *supra*,[5] that prohibits the filing of competing applications by non-licensees for a period of five years, cannot correct the defective notice to potential applicants that would file responsive competing applications.[6] Therefore, the Joint Petitioners submit that such applications should be permitted, at least for the top 90 MSA markets.

3. In a separate Petition for Clarification and Partial Reconsideration, Hammond Telephone Company (Hammond) also asserts that the Court in *Maxcell* found that at the time La Star filed an application, the Commission had not provided La Star sufficient notice that the fill-in policy precluded applications filed by licensees to expand their CGSAs from being challenged by competing applications. Hammond argues that even though it did not file an application as La Star did, it still is entitled as a potential applicant to notice regarding its right to file an application to serve any areas not currently licensed to the existing cellular licensee. Hammond says that it relied on an indication by the Commission in *Cellular Communications Systems*, 86 FCC 2d 469, 491 (1981), that the opportunity for filing applications would be available once the initial filing periods had passed.[7] Hammond maintains that at the time it was eligible to file an initial application for one of the top 30 MSAs, it had no notice that its eligiblity to file for unserved areas would be suspended for the five-year period adopted in the *Second Report and Order*, *supra*.

4. Furthermore, Hammond contends that the notice and comment requirements for Rule Making of the Administrative Procedure Act, 5 U.S.C. Section 553 (APA) apply to potential applicants like itself as well as actual applicants[8] and that Section 309 of the Communications Act requires that the Commission must afford notice of procedural rules governing the processing of mutually

exclusive applications to potential applicants. Hammond also argues that the APA notice requirements are not mitigated by the Commission's statement that any harm to potential applicants for fill-in areas in the top 90 MSAs would be outweighed by the benefits of its overall fill-in policy.[9] Even if notice and comment had been provided, according to Hammond, the harm caused to applicants seeking to serve unserved areas would outweigh the benefits of the policy, because after the protected five year period for licensees expires, there may not be any unserved territory in a given MSA remaining for applicants like Hammond to serve.

5. Telocator replies that the joint petitioners' argument seeks to extend *Maxcell* beyond its original scope encompassing the La Star application. Telocator argues that, unlike La Star, the joint petitioners have not asserted that they filed applications to serve unserved areas within an MSA under the Commission's rules at that time, and therefore, they have not suffered harm. BellSouth contends that the amended rules for fill-in applications are not procedural rules adopted with insufficient notice but are substantive decisional rules for determining in all cases which applications should prevail. According to BellSouth, although concurrent consideration of mutually exclusive applications is normally required,[10] it has been established that applications which compete with CGSA expansion fill-in applications will not be accepted for filing if filed during the five year fill-in period and thus will not be entitled to consideration.

DISCUSSION

6. Petitioners' arguments regarding *Maxcell* and allegedly insufficient notice of the refined fill-in policy are without merit. The court in *Maxcell* determined that the Commission provided applicants with sufficient notice that applications for unserved areas of an MSA filed in the first instance after a date certain deadline would be deemed untimely.[11] However, the court examined the Commission's pronouncements concerning the filing of cellular applications prior to the *Cellular Lottery Rule Making*[12] and determined that prior orders did not sufficiently inform La Star that applications to compete with a licensee's fill-in application would be deemed untimely under the Commission's cut-off procedure for filing by a date certain. The *Maxcell* court concluded that, "La Star had no notice that it might lose its ability to choose between filing an initial application before the cut-off for the fringe area it sought or contesting with a competing application an incumbent licensee's major amendment filed after the cut-off to serve that fringe area." *Maxcell, supra*, at 1560. Because the court found that the Commission did not provide sufficient notice to La Star of a change in its cut-off rules, and La Star had "filed within the 60 days allowed after public notice of a major amendment," it ruled that the Commission could not reject La Star's competing application on the ground that it was untimely filed under the cut-off procedure for filing by a date certain, and therefore, must reinstate it *nunc pro tunc*. *Id*.

7. Pending the appeal of this notice issue to the court, the Commission issued a *Further Notice of Proposed Rule Making*, 1 FCC Rcd 499 (1986) (NPRM), and invited comment on whether non-licensees should be allowed to file or be granted applications to serve unlicensed areas in an MSA at some fixed period after the grant of the construction permit. The petitioners filed comments in this proceeding[13] and also had an opportunity to file replies to the comments proposing different fill-in periods, including the adopted period of five years. Their arguments were noted and discussed in the *Second and Report and Order*.[14]

8. We reject Joint Petitioners' argument that *Maxcell* directed the Commission to accept all "responsive" fill-in applications like that of La Star in a top 90 MSA because the notice provided by the NPRM cannot correct the insufficiency of prior notice that the court found. The *Maxcell* court held only that the Commission could not dismiss an application as untimely filed for failure to comply with a date certain for filing cut-off procedure of which the Commission had not given adequate notice. The court did not purport to address the question raised here of whether the Commission, through a notice and comment Rule Making proceeding, may adopt eligibilty requirements that will render certain applicants unqualified and subject to dismissal without a hearing. Indeed, the Commission's authority to take such action is well-established.[15] As noted in paragraph 7, *supra*, the NPRM in this proceeding provided potential MSA applicants, including petitioners, with explicit notice that if the proposed fill-in policy were adopted for some period of time, it would have an impact on their expectation of being eligible for authorization to serve any unlicensed areas in an MSA in the future. Indeed, petitioners and other parties filed comments on the issue of fill-in periods. Consequently, on this ground, we also reject Hammond's contention regarding insufficient notice to potential applicants under the APA.[16]

9. We also reject petitioners' argument that we should reconsider our decision because they relied on our rules existing prior to the *Cellular Lottery Rule Making, supra*, in deciding not to apply for an initial license but rather to apply for an unserved MSA area, if any were available, after the initial nationwide cellular licensing period. In not filing initially, they also assumed the risk that the Commission would, as it did here, modify its cellular rules so as to limit their eligibility for unserved areas in the future.[17]

10. With regard to petitioners' contention of the harm that they will suffer from the fill-in policy due to the unlikelihood after five years that there will be unserved areas in the MSA for which they have state certification to provide landline telephone service, we conclude that the harm alleged does not outweigh the benefits of getting cellular service quickly to areas of major markets where service is most needed. First, petitioners do not contend that their opportunity to apply for these areas will be completely negated. They may still apply after the five year period has expired. Second, that an applicant's expectation is frustrated as a result of a rule change does not render the rule modification invalid. *See Cellular Lottery Rule Making, supra*, at 183, n. 26; *see also Multi - State Communications, Inc. v. FCC*, 728 F. 2d 1519 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1017 (1984). Third, we concluded in the *Second Report and Order* that allowing initial licensees the flexibility to modify or expand their CGSAs for a protected period is the best way to get cellular service to the public expeditiously and efficiently for several reasons. This policy provides an orderly and predictable process for cellular system development and has prevented regulatory delays that affect the ability of permittees to initiate operations as efficiently as possible

and to modify cellular systems based on the unique characteristics of each MSA. Petitioners have not persuaded us that their alleged harm outweighs these benefits to the public. Moreover, with the fill-in rule in effect, the Commission staff can continue to administer the licensing scheme for MSAs as well as the initial application process for RSAs without diverting its resources to process unrestricted applications for fill-in areas. Therefore, we conclude that our analysis correctly weighed the harm potential fill-in applicants may experience from a five year fill-in period with the advantages of adopting the revised fill-in policy.[18]

The Five Year Period for Protected CGSA Expansion

BACKGROUND

11. McCaw contends that we have not given adequate consideration to the fact that non-wireline grants have significantly fallen behind grants to the wirelines. McCaw maintains that in setting the five-year period to start from the date of the grant of the first construction permit regardless of whether the grant is to a wireline or non-wireline carrier, the Commission did not consider the impact of the ability of the wirelines to reach full market settlements and quickly obtain construction permits due to fewer wireline applications being filed per market. McCaw asserts that because the huge number of non-wireline applications has precluded full market settlements in most MSAs, hearings and lotteries have been required. Given this situation, according to McCaw, the Commission's fill-in policy exacerbates any existing headstart problems. The first grantee in a market has the opportunity to expand its system without the risk of facing competing applicants, while the second grantee, generally a non-wireline, has a shorter period of time to construct and initiate service. McCaw also argues that the second grantee will also have inadequate time to determine the areas for expansion before facing competing applications. Non-wireline systems may have to expand their system prematurely and expend resources inefficiently. In reply, Telocator adds that most of the construction and operational costs are incurred in the first years of system development and that consequently providing service to the initial area and the area of expansion simultaneously would impose a severe economic burden on the operator.

12. McCaw asserts that the view expressed in the *Second Report and Order* that the non-wirelines can follow the lead of the wirelines as resellers of wireline service prior to their own expansion does not take into account the fact that non-wirelines develop their system using approaches different than the wirelines. Further, McCaw contends, in reality, non-wireline carriers as resellers gain only limited information about the technical requirements and customer demands in areas outside the CGSA. Non-wireline carriers, maintains McCaw, may use a different switch and transmitting equipment, different site locations and power levels, and consequently may not be able to assess service needs outside its CGSA until it begins to operate its own system. McCaw argues that the Commission's current approach forces non-wirelines to fit the mold of the wireline carriers. Finally, McCaw argues that allowing each cellular carrier five full years to expand its service area by revising Section 22.31(a)(1)(i) of the rules can achieve the Commission's objective for an orderly and predictable process of accepting applications to expand or modify CGSAs just as easily as the plan adopted.

13. BellSouth replies that in markets where it operates, the second licensees have commenced service with systems that are geographically coextensive with BellSouth but differ from the original proposals. BellSouth contends that second licensees have demonstrated the ability to compete with the first licensee and implemented their systems by relying on the experience and actions of the first licensee. BellSouth challenges McCaw's claim that being a reseller of wireline service provides only limited information about technical requirements and customer demands. According to BellSouth, system coverage of the second licensee which is comparable to that of the first places both on an equal competitive basis. However, it asserts that, under McCaw's proposal, the second licensee with its five year protected period starting later would be able to continue to expand its system free from challenges from competing applicants, while the first licensee would have to face challenges to expansions of its CGSA which it might need to compete with the second licensee.

14. McCaw responds that BellSouth's view results from the fact that the second licensee is trying to catch up to the first licensee's headstart and is not probative of how each licensee will determine how it should expand its system. McCaw emphasizes that in developing their systems, non-wirelines have pursued different ways than have the wirelines. BellSouth, it contends, ignores such differences as those in equipment, propagation characteristics, coverage definition of fill-in areas, and customer demands. McCaw maintains that information concerning these matters cannot be gathered until the system is turned on and each licensee develops its own plan on gathering information about areas outside its CGSA. As to BellSouth's opinion that the first licensee will be disadvantaged competitively, McCaw says that the first licensee's facing competing applications at an earlier point merely reflects the headstart that it has. The second licensee, argues McCaw, should have the same protection of full five year period to put its own assessment of system needs into operation in order to assure parity with the first licensee.

DISCUSSION

15. On considering the comments, we are concerned that the second licensee in a market may not have sufficient time to expand and make the necessary modifications to its systems within a period of five years from the date of the first construction authorization in a particular MSA. Reexamination of the permit dates in some of the initial MSAs shows that the second licensee, generally the non-wireline licensee, did not receive its permit until almost two years or more after the first permit was granted. The recent application processing experience of our staff shows that significant delays to the grants of some permits can occur for several reasons. One is the litigation process involving petitions to deny and subsequent filings permitted under the rules. A second has been the alleged abuses in our cellular licensing process revealed by matters raised in such petitions and in our own processing and review of applications. These matters include issues of the real party in interest in the applications, especially those filed in markets after the top-120. The real party in interest issues have resulted in the designation of winning

applications in several markets for hearing as well as in additional staff time in acting on the petitions filed. These issues have also led the Commission to investigate winning applicants in several other MSAs beyond the top-120 and to request the Justice Department to consider whether criminal violations have occurred. In most of these markets, we have not granted cellular authorizations.

16. Given the technical, operational, and financial considerations noted by the commenters and the causes of delay in permits to some carriers, we find that requiring the second carrier to expand within five years from the date of the first carrier's construction permit or be subject to competing applications unfairly restricts its ability to meet the unpredictable changes in service needs and accordingly amend Section 22.31 (a)(1)(i) of the rules to reflect our determination. Specifically, we amend Section 22.31 (a)(1)(i) to provide all licensees a protected fill-in period of five years which runs from the date of the initial construction authorization for each frequency block granted in an MSA. This will make our MSA fill-in rule consistent with our RSA fill-in rule. *See* Section 22.31 (f).

Wireline Set Aside for MSA Fill - in Applications

BACKGROUND

17. Hammond asserts that the *Second Report and Order* is not clear as to whether after the five year period, non-wireline entities will be permitted to file for the wireline block without restriction and vice versa. Hammond requests that we clarify this matter. The basis for the request, asserts Hammond, is that potential wireline applicants had no notice at the time applications for the top-90 MSAs were accepted for filing that applications to serve any remaining unlicensed areas filed by wireline applicants after five years would be competing with non-wireline fill-in applications on the wireline frequency block.

18. Hammond also contends that the Commission's current five year fill-in policy appears to lower the fence between non-wireline and wireline applicants, and thus conflicts with the reasons for creating the fence initially. Instead of expediting cellular service to potential fill-in areas as expressed in *James F. Rill*, 60 Rad. Reg. 2d (P&F) 583 (1986). Hammond argues, such a policy delays service and also precludes effective utilization of wireline technical expertise that the Commission has stated previously would be beneficial in implementing the service. *See Cellular Communications Systems*, *supra*, at 491. Joint Petitioners suggest in addition that we should maintain the wireline/non-wireline fence for fill-in applications because it would reduce the Commission's workload and speed cellular service to the public.

19. Telocator asserts that the Commission has already decided that the set aside policy for the wireline carriers will expire "after initial filing periods have passed." We would then reopen all remaining frequency blocks in areas that have not been applied for, such as the fill-in areas, without regard to a set aside." *Cellular Lottery Rule Making*, 98 FCC 2d 175, 198 (1984). Thus, claims Telocator, it is clear that the wireline fence will not apply to fill-in applications. It argues that Hammond's proposal for a sixty day grace period would prolong the effect of the set aside during which only certain wirelines could file for unserved areas and contravene our intent to minimize the anticompetitive effects of the set aside by placing a limit on its duration. *James E. Rill*, *supra*, at para. 29.

20. McCaw replies that Hammond's approach would be inconsistent with the Commission's goal of bringing the benefits of cellular technology to the greatest number of people within the shortest amount of time through orderly expansion. *New Orleans CGSA*, Mimeo 6904, at para. 7 (Com. Car. Bur., released October 1, 1984); *application for review denied*, FCC 85-209 (released May 6, 1985), *aff'd in part*, *Maxcell Telecom Plus, Inc v. FCC*, 815 F. 2d 1551 (D.C. Cir. 1987). McCaw says that non-wirelines likely to file many of the applications for unserved areas can be expected to be entities that have genuine incentives to meet the public needs in such areas.

21. McCaw asserts that when we eliminated the wireline/non-wireline "fence" in the paging and conventional mobile services, we rejected arguments like Hammond's and stated that a dual allocation scheme which provided exclusive use of certain frequencies for wirelines cannot be maintained to insulate them from competition when we were not curtailing their ability to compete for providing these services.[19] McCaw argues that in filing for unserved areas, Hammond's opportunity to file an application and serve such an area would not be similarly curtailed. Further, McCaw asserts that Hammond has nothing more than a claim of a lost opportunity to file an application having a high probability of success and is not automatically entitled to an authorization in frequency Block B. McCaw also submits that the possession of special technical expertise asserted by wireline petitioners for providing cellular service is frivolous.

DISCUSSION

22. We have previously stated that we would retain the wireline set aside through the end of the initial filing periods for the remaining MSA/NECMA areas and the non-MSA/non-NECMA filings and then reopen all remaining frequency blocks in areas which have not been applied for, without regard to a set aside. *Cellular Lottery Rule Making*, 98 FCC 2d 175, *supra*, at para. 41. We have done this for the wireline frequency block in the Hagerstown and Cumberland, Maryland MSAs. However, we did not set a date certain for the expiration of the set aside because of the difficulty in predicting the completion of the initial licensing for the cellular sytems.[20] *Id.* Instead of setting such a date, we decided to retain "the set aside through the initial filing periods for all markets." *Id.*

23. We further amplified our policy regarding the set aside in *James F. Rill*, *supra*, at para. 32. We stated that the set aside was established "to give both wireline and non-wireline eligibles an opportunity to become involved in providing cellular service; and that once authorizations are granted to two competing systems, that opportunity was over. . . ." *Id.* Thus, we conclude that the petitioning wireline companies had sufficient notice that any fill-in applications filed on the frequency block that they wished to serve would eventually be subject to competing applications filed by anyone.

24. Hammond has not provided a sufficient justification for us to change these policies regarding the process of filing applications to serve any remaining unserved areas in an MSA. The initial filing period for all MSA markets has essentially been completed. In addition, the end of the five year period for licensees to be protected from com-

peting applications in expanding their systems is near in several of the MSAs. The set aside has served our policy objectives for the initial licensing of the MSAs and extending it to MSA applications for unserved areas is unnecessary. The clear intent of our words was to get rid of the fence at a time after the initial filings for all markets had occurred under the set aside. Thus, we see no reason to alter our basic decision to eliminate the fence upon the expiration of five year fill-in period for licensees.

25. While telephone carriers have incentive to develop cellular service as an adjunct to their local exchange facilities, *see James F. Rill, supra*, at para. 37, this incentive should not be insulated from competition after the initial licensing period and the protected period for CGSA expansion have expired.

Sixty Day Grace Period for Fill - in Applications of Wireline Carriers

BACKGROUND

26. Hammond further requests that if we do not retain the fence for fill-in applications, we should adopt a sixty day grace period after the end of the existing five-year period for wireline applicants for fill-in areas to file applications on Frequency Block B. Hammond contends that such a grace period is justified on the basis that Hammond had inadequate notice that the fill-in policy would be in effect for five years and that the wireline set aside would no longer remain for still unserved areas. Moreover, it claims that a sixty day grace period for applicants like itself would enable the Commission to avoid the administrative burden of processing an unlimited number of non-wireline applications for unserved areas on Block B.

DISCUSSION

27. Our resolution of the notice issues above renders Hammond's contention of inadequate notice unpersuasive. As for the administrative aspects of its request, we believe that Hammond's fears of unlimited numbers of non-wireline applications are unfounded. In the very top MSAs for which the five year period has expired for frequency block B, we have received few applications. Furthermore, at a time when the Commission is still resolving outstanding issues regarding the applications of tentative selectees in the lower MSAs and has begun processing applications for RSAs, we do not believe that Hammond's proposal has benefits in light of the overall regulatory burden we face in getting cellular service to the public expeditiously. Accordingly, we do not adopt the proposed 60 day grace period for fill-in applicants.

Procedures for Applications for Unserved Areas

28. Joint Petitioners and BellSouth request that we clarify whether applications for areas of an MSA remaining unserved after the expiration of the five year fill-in period will be selected by lottery or comparative hearing. Upon review of these requests and in light of various comments to the NPRM, *supra*,[21] we conclude that there is not an adequate record before us to decide which selection process will be applied to all applications for unserved areas after the completion of initial licensing and the subsequent fill-in periods for the MSAs as well as Rural Service Areas. Therefore, the Commission intends to request comment in the near future on its proposals regarding procedures for selecting among mutually exclusive applications for remaining unserved areas.[22]

CONCLUSION

29. We believe that our resolution of the issues raised herein will further our objective of getting cellular service to the public efficiently and quickly. The benefits of a fill-in policy that provides a protected period of five years for each frequency block in an MSA or RSA clearly promote this objective and outweigh the harm perceived by a few potential applicants for unserved areas. Our policy will promote the development of cellular systems that will provide service to accommodate efficiently changes in demand and system requirements, while still providing a service opportunity to potential applicants. We therefore conclude that our policy provides the best approach for expediting the availability of service to unserved areas of the MSAs.

ORDERING CLAUSES

30. Accordingly, IT IS ORDERED, That the Petitions for Reconsideration and Clarification filed in this proceeding are GRANTED to the extent set forth herein, and are otherwise DENIED.

31. IT IS FURTHER ORDERED, That Part 22 of the Rules ARE AMENDED as specified in Appendix A. These amendments and other policies adopted in this order will become effective 30 days after publication of this document in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Rules Section

Part 22 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 22 - Public Mobile Service

1. The authority citation continues to read:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303).

2. Section 22.31 (a) (1) is revised to read as follows:

Section 22.31 Mutually exlcusive applications.

* * * * *

(a) * * *

(1) In the Domestic Public Cellular Radio Telecommunications Service, applications shall be considered mutually exclusive if their proposed Cellular Geographic Service Areas (CGSAs) overlap in such a way that a grant of one would preclude the grant of one or more of the other applications, except that applications for the same Rural Service Area (RSA) will be considered mutually exclusive regardless of whether their CGSAs overlap, provided however that:

(i) notwithstanding any other provision of this rule section and rule provision of this Part, applications by other than licensees or grantees for a Metropolitan Statistical Area (MSA) to serve unserved areas outside the presently authorized CGSA but within the MSA will not be accepted for five years from the date of the grant of the original construction authorization of each system in an MSA.

* * * * *

APPENDIX B

Petitions for Reconsideration

Amery Telephone Company, Baldwin Telecom,Inc., and Hammond Telephone Company (Joint Petitioners)

Hammond Telephone Company (separately-filed Petition for Clarification and Partial Reconsideration)

Osceola Telephone Company (joining Joint Petitioners)

McCaw Communications Companies, Inc.

Oppositions

BellSouth Mobility, Inc.

Hammond Telephone Company

McCaw Communications Companies, Inc.

Telocator Network of America, Cellular Telecommunications Division

Replies to Oppositions

Hammond Telephone Company

McCaw Communications Companies, Inc.

FOOTNOTES

[1] *Cellular Service*, CC Docket 85-388, 2 FCC Rcd 2306 (1987).

[2] A fill-in application is an application by a cellular licensee or the holder of a construction authorization to serve an area within a cellular Metropolitan Statistical Area (MSA) but outside the existing Cellular Geographic Service Area (CGSA). These may also be major amendments.

[3] The parties who filed petitions for reconsideration as well as those who filed responsive pleadings are listed in Appendix B.

[4] Osceola Telephone Company filed a statement supporting the joint petitioners.

[5] Section 22.31 (a) (1), as amended.

[6] The application filed by La Star was termed a "responsive fill-in application", since it would be filed by the applicant responding to a major amendment proposed by the existing licensee under Section 22.903 (d) of the rules that would extend 39 dBu contours beyond the authorized CGSA. "Initial fill-in applications", on the other hand, propose to serve an area of an MSA in which the incumbent licensee/permittee has not proposed service in its original application. According to the Joint Petitioners, *Maxcell* concluded that the Commission had not provided a clear position on applicants like La Star on such responsive or competing fill-in applications until the cut-off dates for filing applications had passed.

[7] Hammond, who provides local exchange service to portions of the Minneapolis/St. Paul, Minnesota MSA (Minneapolis MSA), asserts that it could not afford to file an application for a top 30 market such as the Minneapolis MSA because the lengthy initial comparative hearing process for selecting mutually exclusive cellular applicatons made filing costs prohibitive. As a result, it asserts that it intended to file an application later to serve areas in the MSA unclaimed by the bigger wireline. It says its action was based on our pronouncement in Cellular Communications Systems, *supra*.

[8] Hammond relies on Small Refiner Lead Phase-Down Task Force v. EPA, 705 F. 2d 506, 547 (D.C. Cir. 1983).

[9] Second Report and Order, *supra*, at n. 8.

[10] *See* Ashbacker Radio Corporation v. FCC, 326 U.S. 327 (1945).

[11] Maxcell, *supra*, at 1559-1560, *citing* Cellular Communications Systems, 89 FCC 2d 58, at 87, 89 (1982).

[12] Cellular Lottery Rule Making, 98 FCC 2d 175 (1984).

[13] *See* Second Report and Order, *supra*, at Appendix A.

[14] *Id.*, at n. 8.

[15] Storer Broadcasting Co. V. FCC, 351 U.S. 192 (1956).

[16] Contrary to our suggestion in the *Second Report and Order*, 2 FCC Rcd at 2308 n. 8, the fill-in rules adopted in this proceeding are not being applied retroactively. The revised section 22.31 applies (and has been applied) only as of the effective date of the revised rule (June 5, 1987).

[17] Even if petitioners had filed timely applications, they would not necessarily be protected against rule changes that affect the substantive standards governing review of their applications. *See generally* Storer Broadcasting Co. v. FCC, 351 U.S. 192 (1956). *See also* Bowen V. Georgetown University Hospital, _____ U.S. _____, 109 S.Ct. 468, (1988). (Scalia, J., concurring) (Where a rule has "retroactive effects" or "secondary retroactivity," i.e., it "merely affect[s] past transactions" rather than "change[s] what was the law in the past," it may be upheld if reasonable).

[18] Second Report and Order, *supra*, at paragraphs 13-17 and n. 8.

[19] Elimination of the Separate Frequency Allocation Structure in the Public Land Mobile Service, 99 FCC 2d 311 (1984).

[20] Cellular Communications Systems, 86 FCC 2d 469, 488 (1981); *modified*, 89 FCC 2d 58, 70 (1982).

[21] *See* Comments of Bell Atlantic Mobile Systems, Nynex Mobile Communications Co., and Metromedia Company, filed December 22, 1987; and Reply Comments filed by Ameritech Mobile Communications, Inc. *See also Second Report and Order*, *supra*, at 2 FCC Rcd 2309.

[22] We note that, pending completion of such a proceeding, applications for unserved areas filed after expiration of the five-year period will not be accepted. *Second Report and Order*, 2 FCC Rcd 2306, 2309 & n.17 (1987). *See also Order*, DA 89-404 (Com. Car. Bur., released April 10, 1989), *pet. recon. pending*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-313

In the Matter of

Policy and Rules Concerning Rates
for Dominant Carriers

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 1989; Released: June 27, 1989

By the Commission:

I. INTRODUCTION

1. At an open meeting held March 16, 1989, this Commission adopted a final Order in the above-captioned proceeding that altered the basis on which the Commission would evaluate in the Section 204 tariff review process the rates for interstate services filed by American Telephone and Telegraph Company (AT&T).[1] Through a series of amendments to our tariffing rules, this Commission adopted a form of regulation known as "price caps," a regulatory system that establishes, for tariff review purposes, limits or "caps" on the prices AT&T can charge for its services. Those rules became effective May 17, 1989, the day on which we ordered AT&T to file its first price cap tariff.[2] On June 8, 1989, we received two motions, filed by Puerto Rico Telephone Telephone Company (PRTC) and La Telefonica Larga Distancia (TLD), seeking a stay of the AT&T price cap rules pending reconsideration of the *Price Cap Order*.[3] AT&T filed oppositions to the motions on June 15, 1989. AT&T's price cap tariff is scheduled to take effect July 1, 1989.[4]

2. The price cap rules we adopted for AT&T provide for streamlined treatment of AT&T tariff filings so long as AT&T files rates that are below a price cap and that comply with a series of pricing rules we established. Taken together, the cap and the pricing rules form a "no-suspension zone." So long as AT&Ts' proposed tariffs stay within the zone created by our rules, they are presumed lawful[5] and may be filed on 14 days' notice. Rates outside the zone and tariffs that involve new or restructured services do not carry a presumption of lawfulness, and are filed in longer notice periods supported by various types of showings.[6]

II. POSITIONS OF THE PARTIES

A. *Puerto Rico Telephone Company*

3. PRTC argues that it will be irreparably harmed if the price cap rules are not stayed. PRTC states that the access flow through requirements, which specify how AT&T is to flow through changes in access charges to various groups of its services, permit rates to depart from costs, and that the separation of rates and costs will render Local Exchange Carrier (LEC) forecasts of access demand unreliable. raising the level of uncertainty and, consequently, prices for access service.[7] PRTC argues that since this Commission's rules only require AT&T to flow through access charge changes to the three groups, or "baskets," of services based on usage of various types of access, AT&T may disproportionately apply access charge changes to one service or rate element within a basket. PRTC argues that AT&T can thereby skew demand for access services and increase the risk that PRTC's rates will not recover costs.[8]

4. PRTC also argues that irreparable harm will result from this Commission's failure to consider price cap regulation for LECs at the same time as for AT&T.[9] According to PRTC, consideration of regulatory reform for AT&T without simultaneous consideration of regulatory reform for LECs may lead this Commission into policy decisions that do not properly balance LEC interests.[10] PRTC states that once price cap regulation for AT&T takes effect, it will be impossible to "undo" a policy decision that does not take LEC concerns adequately into account.[11]

5. In addition to arguing that it faces irreparable harm, PRTC states that it is likely to succeed on the merits of its arguments to modify the access flow through rule and to merge implementation of price caps for AT&T and the LECs. PRTC characterizes its proposed access flow through changes as "minor," and also argues that consideration of LEC price cap rules jointly with AT&T rules is mandated by the Administrative Procedure Act.[12] PRTC further argues that the public interest would only be served by a price cap plan that takes LEC interests into account.[13] Finally, PRTC states that grant of a stay will not damage AT&T's interests, since AT&T is already competing vigorously in the marketplace under existing rate of return regulation. According to PRTC, harm to AT&T would be minimal and temporary.[14]

B. *La Telefonica Larga Distancia*

6. TLD argues that the pricing flexibility built into the price cap rules for AT&T, coupled with insufficient safeguards against anticompetitive activity, leave long distance service providers vulnerable to anticompetitive behavior by AT&T.[15] TLD states that it will be irreparably harmed due to four specific rule provisions that provide AT&T with too much flexibility: (1) the placement of cross-inelastic services in the same baskets, increasing the likelihood of unlawful cross subsidy; (2) the access flow-through rule that permits AT&T to uncouple rates and costs; (3) the decision to apply annual limits on movement in AT&T prices at the service level (known as "banding" of service prices), instead of applying the limits to rate elements; and (4) permitting AT&T to introduce as "new" services variations of existing services, and to price the "new" services below cost.[16] TLD argues that once price cap rules are implemented, it will be impossible to "undo" their harmful effects in the event this Commission changes its requirements on reconsideration.[17]

7. TLD also argues that it is likely to succeed on the merits of its claim, and that a stay will not damage AT&T's interest in price cap regulation.[18] TLD states that the possibility of losses to AT&T from a stay are "highly speculative."[19] Finally, TLD argues that the public interest is in full and fair interexchange competition, and that the benefits of such competition are not likely to accrue unless a stay is granted.[20]

C. *AT & T*

8. AT&T, opposing the motions for stay of the price cap rules, argues that the motions are untimely, and that the petitioning parties have failed to meet the requirements for a stay. AT&T first argues that because the price cap rules have been in effect for nearly one month prior to the filing of the stay motions, grant of a stay would not accomplish the fundamental objective associated with injunctive relief -- maintenance of the status quo.[21] AT&T cites a prior decision by this Commission refusing to stay a rule that had become effective prior to the filing of the stay request.[22]

9. AT&T also argues that PRTC and TLD have not met the showing required for a stay of the rules. With respect to PRTC, AT&T asserts that PRTC has shown no likelihood of prevailing on the merits of its proposed modifications to the access flow through rule, since AT&T has never been required to flow access charge changes to rate elements on a uniform basis.[23] AT&T also argues that this Commission's pending Second Further Notice of Proposed Rule Making on price cap rules for LECs provides meaningful opportunity to comment on proposed rules, and to tailor rules to the LECs where necessary.[24] AT&T states that PRTC has failed to demonstrate irreparable harm, and that grant of a stay is contrary to the public interest. AT&T also states that it would be harmed by failure to permit the price cap rules to take effect as scheduled.[25]

10. With respect to TLD, AT&T states that the anticompetitive concerns TLD raises were fully litigated in the *Price Cap Order*, and that no likelihood exists that TLD will prevail on the merits of its claims on reconsideration. AT&T also argues that multiple safeguards have been built into the price cap rules to make anticompetitive practices unlikely.[26] AT&T further states that the access flow through rule adopted in the *Price Cap Order* does not provide any new or additional flexibility to flow through rates to a single service or rate element. AT&T argues that under prior regulation, access flow throughs were not required to be uniform to the rate element level.[27] AT&T also states that the rules concerning new services, which require AT&T to demonstrate a net increase in revenues as a result of the new offering, are sufficient to protect against predation.[28] AT&T concludes that TLD has failed to demonstrate that it will be irreparably harmed, and that grant of a stay would be contrary to the public interest. AT&T also asserts that it will be harmed by a failure to implement price cap regulation promptly.[29]

III. DISCUSSION

11. Before reaching the merits of the motions for stay, we must initially consider AT&T's argument that the motions, filed approximately three weeks after the effective date of the rules, are not properly before us. We find that AT&T's argument does not bar consideration of ther merits of this stay request. While the new rules have technically taken effect, and a tariff has been filed pursuant to those rules, price cap rates will not become effective any earlier than July 1, 1989, when the initial price cap tariff is scheduled to take effect.[30] We will therefore examine the merits of the motions before us.

12. In acting on motions for stay, this Commission follows the standards of the United States Court of Appeals, District of Columbia Circuit, enumerated in the *Virginia Petroleum Jobbers* and *Holiday Tours* decisions.[31] Those cases require the petitioners demonstrate each of the following in order to prevail on a motion for stay: (1) that petitioners are likely to succeed on the merits of their claim; (2) that petitioners will suffer irreparable harm should a stay not be granted; (3) that a stay would not substantially harm other interested parties; and (4) that the public interest favors a stay. Based upon our review of the pleadings and our *Price Cap Order*, we conclude that petitioners have failed to demonstrate that they will be irreparably harmed if price cap regulation is implemented as scheduled. We also conclude that the public interest strongly favors immediate implementation of price cap regulation. We therefore deny the motions for stay. Since we find that two prongs of the *Virginia Jobbers* test have not been met, we need not address whether grant of a stay would harm AT&T or the likelihood that petitioners will succeed on the merits.

13. Petitioners have made a series of three arguments to demonstrate that they will be irreparably harmed. First, TLD argues that the price cap rules provide so much pricing flexibility that AT&T will be able to act in an anticompetitive manner, driving its competitors out of the market. The second argument is that pricing flexibility permitted by the access flow through rules will disrupt PRTC's ability to adminster its access rates or permit anticompetitive behavior by AT&T against TLD. Finally, PRTC argues that adopting price cap rules for AT&T and for the LECs sequentially will result in rules that do not properly balance LEC interests. We will consider each of these arguments in turn.

14. We are not persuaded that TLD will suffer irreparable harm as a result of the system of baskets and bands we have designed. In order to warrant a stay, the irreparable harm suffered by a petitioner "must be both certain and great; it must be actual and not theoretical."[32] TLD's arguments, far from explaining how actual harm will result, focus on what AT&T might do to its prices under the rules. We find no demonstration of irreparable harm arising from implementation of the *Price Cap Order*. Furthermore, safeguards in the design of the baskets and bands that now exist would prevent any possible immediate harm at least during the time in which reconsideration petitions are pending. Instead of placing all of AT&T's services under a single cap, we elected to group AT&T's services into baskets, with each basket subject to its own price cap.[33] In addition, the rates for each service category within each basket are limited to annual increases of 4 or 5 percent, and annual decreases of 5 percent, a feature of the price cap rules known as rate banding.[34] Although AT&T is free to change service rates (or even the prices of rate elements) so long as the aggregate does not pierce the cap, AT&T must also comply with the banding limitations that prevent service prices from moving more than 4 or 5 percent per year.[35] Given this limitation on movement in AT&T's prices, we cannot find, in the absence of a showing to the contrary, that irreparable harm will result if we fail to stay the effectiveness of the price cap rules pending reconsideration.[36]

15. Nor do we find that TLD has made a showing that it will be irreparably harmed by our decision to apply banding to AT&T services, as opposed to the rate elements of those services. Since customers of interexchange carriers subscribe to services, not to rate elements, TLD has not demonstrated how, in a manner consistent with

the banding limitations, AT&T could manipulate rate elements in an anticompetitive manner to drive TLD and other competitors from the market.

16. TLD's argument that price cap rules permit new services to be priced below cost similarly fails to demonstrate irreparable harm, particularly since it ignores the safeguards established in the price cap rules to prevent such pricing. TLD's argument is based on the possibility that a new service priced at an anticompetitive rate, may be filed in the future, and does not rest on any showing of actual harm.[37] Furthermore, under our price cap rules, new services are introduced on the basis of a net revenue test that requires AT&T to demonstrate that the new service will increase AT&T's net revenues for services subject to price cap regulation. No presumption of lawfulness attaches to the filing. In addition, new service tariffs must be filed on 45 days' notice. Should AT&T file a tariff for a new service that TLD believes raises issues of predatory pricing, TLD may petition against the tariff, just as AT&T's competitors were free to do under rate of return regulation. Thus, TLD has not demonstrated that the net revenue test will cause irreparable harm.

17. The petitioners also fail to demonstrate that irreparable harm will result from our failure to require access flow throughs to the service category or rate element level. No such flow through rule existed under rate of return regulation.[38] We are therefore unable to see why PRTC is in any different position in forecasting its access demand today than it was under rate of return. Furthermore, PRTC, like all LECs, has the option of filing midcourse corrections to its access tariffs to correct its rates if original demand projections are incorrect. There is no reason to believe that the price cap flow through rules put TLD at any more risk of anticompetitive behavior than it was under rate of return. While it is true that, to the extent AT&T complies with our cap and band limitations, its tariffs will be filed under a presumption of lawfulness, we cannot find that TLD has demonstrated irreparable harm in the absence of a showing of actual harm caused by a 5 percent decrease in service prices.

18. PRTC's argument that we must simultaneously consider the AT&T price cap rules and LEC rules also fails to demonstrate irreparable harm. The *Second Further Notice*, contained in the *Price Cap Order*, sets forth a detailed proposal for price caps for LECs, and recommends modification of the price cap rules we adopted for AT&T in several significant respects.[39] Thus, the *Second Further Notice* evidences our intent to adopt different rules for LECs where different rules are warranted. Bifurcation of the proceeding will not irreparably harm LEC interests, and fully complies with the requirements of the Administrative Procedure Act.

19. The petitioners' motions for stay also fail to consider the impact on the public interest if a stay is granted. Price cap regulation offers significant consumer benefits that do not exist under rate of return regulation, including decreases to AT&T's basic long distance schedule and discount plans used primarily by residential customers. If implemented, the proposed decreases would cut AT&T's rates by $140 million. In light of the proposed decreases, we believe that the public interest weighs strongly in favor of proceeding with the implementation of our price cap rules.

20. Since no irreparable harm has been demonstrated, and the public interest strongly favors implementation of the *Price Cap Order* as scheduled, we will deny the motions for stay filed by PRTC and TLD. As a result of our findings, we have no need to examine in detail the other two prongs of the *Virginia Jobbers* showing.[40]

IV. ORDERING CLAUSE

21. Accordingly, IT IS HEREBY ORDERED that the motions for stay filed by Puerto Rico Telephone Company and La Telefonica Larga Distancia ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989) (*Price Cap Order* and *Second Further Notice*). The *Price Cap Order* included a detailed Notice of Proposed Rule Making, proposing a modified form of price cap regulation for the interstate rates of local exchange carriers (LECs).

[2] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 3379 (1989)(Erratum).

[3] The motions for stay were accompanied by petitions for reconsideration filed by both PRTC and TLD.

[4] Section 61.48(a) of this Commission's Rules, 47 C.F.R. § 61.48(a). *See* AT&T Tariff F.C.C. Nos. 1 and 3, Tr. No. 1618, filed May 17, 1989.

[5] The proposed tariffs are presumed lawful only for tariff review purposes. *Price Cap Order*, 4 FCC Rcd at 3253.

[6] *See* Section 1.773(a)(1)(iv) of this Commission's Rules, 47 C.F.R. § 1.773(a)(1)(iv), and Section 61.49 of this Commission's Rules, 47 C.F.R. § 61.49.

[7] PRTC Motion at 3.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 4.

[12] *Id.*

[13] *Id.* at 8.

[14] *Id.* at 5.

[15] TLD Motion at 2.

[16] *Id.* at 3-4. TLD also argues, in a footnote, that the flexibility granted to AT&T to set its prices will make it difficult for competitors to raise capital in the financial markets. *Id.* at n.2.

[17] *Id.* at 4-5.

[18] *Id.* at 5-6.

[19] *Id.* at 6.

[20] *Id.* at 9.

[21] AT&T Opposition to TLD at 1-2; AT&T Opposition to PRTC at 1-2.

[22] AT&T Opposition to TLD at 2 (citing *Smaller Market UHF TV Stations, Group*, 81 FCC 2d 429, 436 (1980)); AT&T Opposition to PRTC at 2.

[23] AT&T Opposition to PRTC at 3-4.

[24] *Id.* at 4.

[25] *Id.* at 5-7.

[26] AT&T Opposition to TLD at 5.

[27] *Id.*

[28] *Id.* at 5-6.

[29] *Id.* at 6-8.

[30] In any event, the case cited by AT&T to support the proposition that a stay cannot be filed against a rule currently in effect involved a rule that had been adopted by this Commission in 1978, reconsidered, appealed, and upheld by the Court. The text of this Commission's decision notes that the motion to stay the rule had been filed after the time for administrative or judicial review had passed, unlike the situation here. Smaller Market UHF TV Stations, Group, 81 FCC 2d 429,436 (1980).

[31] Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958), *modified*, Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977). *See, e.g.*, Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 2 FCC Rcd 3236 (1987); WATS Related and Other Amendments to Part 69 of the Commission's Rules, 62 RR 2d 36 (1987).

[32] Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time").

[33] *Price Cap Order*, 4 FCC Rcd at 3051-52. We divided AT&T's services into three baskets. The residential and small business basket is composed of domestic MTS (basic long distance) divided into day, evening, and night/weekend categories, international MTS, operator and credit card services, and Reach Out America. The 800 services basket is composed of four categories of 800 services. The business services basket contains services targeted toward business users -- Pro America I, II, and III; WATS; Megacom; SDN; other switched; voice grade private line and below; and other private line. Section 61.42(a) of this Commission's Rules, 47 C.F.R. § 61.42(a).

[34] Rates for most service categories are permitted to rise or fall 5 percent per year, but upward movement in the prices AT&T charges for evening and night/weekend MTS is limited to 4 percent per year. Section 61.47(e) and (f) of this Commission's Rules, 47 C.F.R. § 61.47(e) and (f).

[35] Should AT&T file a rate that is beneath the 5 percent "floor," it must support its filing with a showing that the rate is set at a level at least equivalent to its average variable cost. Section 61.49(d) of this Commission's Rules, 47 C.F.R. § 61.49(d).

[36] In making this determination, we are not reaching the merits of the issue before us in the reconsideration proceeding, *i.e.*, whether the safeguards we have adopted will discourage predation. Our decision is limited to the finding that, absent any showing to the contrary, the various safeguards built into the plan should prevent irreparable harm to petitioners.

[37] *See* Wisconsin Gas, 758 F.2d at 674.

[38] *See* AT&T Communications Tariff F.C.C. Nos. 1 and 2, Tr. Nos. 604 and 628, CC Docket No. 86-81, 60 RR 2d 468 (Com.Car.Bur. 1986).

[39] *See* Price Cap Order and Second Further Notice, 4 FCC Rcd at 3212-23 (proposing an automatic stabilizer for LEC earnings under price caps and a special methodology for calculating the cap on common line rates).

[40] *See* Wisconsin Gas Co. v. FERC, 758 F.2d 669.

Before the
Federal Communicatio . . Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

AMERITECH OPERATING COMPANIES — Transmittal Nos. 311 and 315
Revisions to Tariff F.C.C. No. 2

PACIFIC BELL TELEPHONE COMPANY — Transmittal No. 1415
Revisions to Tariff F.C.C. No. 128

SOUTHWESTERN BELL TELEPHONE COMPANY — Transmittal No. 1811
Revisions to Tariff F.C.C. No. 68

ORDER

Adopted: June 23, 1989; Released: June 27, 1989

By the Chief, Common Carrier Bureau:

1. By the above-referenced transmittals, Ameritech Operating Companies (Ameritech), Pacific Bell Telephone Company (Pacific Bell), and Southwestern Bell Telephone Company (Southwestern)[1] have proposed revisions to their tariffs for access services to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings. The revisions are scheduled to become effective on dates ranging from July 6, 1989, to July 22, 1989. None of the revisions is opposed.

2. On June 12, 1989, Pacific Bell filed an application to advance the effective date of Transmittal 1415, originally scheduled to become effective July 15, 1989.[2] Pacific Bell states that advancing the date would allow it to respond to the hardship imposed on the customer by the current effective date.

3. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of local exchange carriers' (LECs) proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings and establishing a pleading cycle.[3] The above-referenced transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the instant transmittals will be subject to the outcome of that investigation. We also grant the LECs listed above special permission to advance the effective dates of these transmittals.

4. Accordingly, IT IS ORDERED that Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal Nos. 311 and 315, Pacific Bell Telephone Company, Tariff F.C.C. No. 128, Transmittal No. 1415, and Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 1811 are subject to the investigation instituted in CC Docket No. 88-136.

5. IT IS FURTHER ORDERED that the local exchange carriers listed in paragraph 4, *supra*, may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 89-446.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

7. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, all local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 311, filed May 25, 1989; Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 315, filed June 7, 1989; Pacific Bell Telephone Company, Tariff F.C.C. No. 128, Transmittal No. 1415, filed May 31, 1989; and Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 1811, filed May 22, 1989.

[2] Pacific Bell Telephone Company, Tariff F.C.C. No. 128, Application No. 160, filed June 12, 1989.

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (1988); Public Network Communications, Inc. Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, DA 89-2, released Jan. 27, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-765

In the Matter of

AMERICAN TELEPHONE
AND TELEGRAPH CO.

Revisions to Tariff F.C.C. No. 2
Wide Area Telecommunications
Service (WATS)

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1989; Released: July 6, 1989

By the Commission: Commissioner Dennis concurring in the result.

I. INTRODUCTION

1. In this Order, we terminate the second phase of our investigation of the American Telephone and Telegraph Company (AT&T) Wide Area Telecommunications Service (WATS) tariff.[1] In light of major changes in the telecommunications industry and in the WATS tariff since the institution of *WATS Phase II*, we conclude that the proposed prescription of a public switched network (PSN) tariff is not warranted and that the issues designated in *Phase II* no longer merit investigation.

II. BACKGROUND

A. *Phase I Investigation*

2. In 1961, AT&T introduced volume discounts for Message Telecommunications Service (MTS) users through the Wide Area Telecommunications Service (WATS) tariff.[2] WATS customers are billed on the basis of total hours of usage in a given month, rather than on a per call basis, as with traditional MTS. AT&T justified the discounted WATS rates on the ground that WATS used more automatic equipment and offered fewer special services, such as itemized billing. We first questioned the validity of the WATS volume discount in 1965,[3] but did not begin a formal investigation until 1974.[4] In 1976, we found WATS rates unlawful, but allowed the rates to remain in effect and ordered AT&T to file new rates.[5] AT&T's subsequent tariff filing, however, was similarly deficient and rejected by this Commission in 1977.[6]

3. In an effort to resolve outstanding questions concerning the rates and rate structures of WATS and MTS, in 1978 we instituted a separate inquiry into whether WATS and MTS are "like" communications services within the meaning of Section 202(a) of the Communications Act of 1934 (the Act), 47 U.S.C. § 202(a). Answering this question in the affirmative, we ordered AT&T to revise its WATS and MTS tariffs so as to eliminate any existing rate discrimination between the service offerings or, alternatively, to demonstrate the justness and reasonableness of any such discrimination.[7]

4. In 1980, in response to a request from MCI for expedition of the WATS proceeding, the United States Court of Appeals for the District of Columbia directed this Commission to establish an expeditious schedule for final determination of a just and reasonable WATS tariff.[8] The court in *MCI v. FCC* pointed out that "a WATS . . . resale requirement or the sharing of WATS might well alleviate some of the alleged noncompetitive aspects about the tariffs now in effect."[9] The Court, however, "[left] resolution of that question initially to the FCC."[10] Several months later, we adopted an Order directing AT&T to strike from the WATS tariff restrictions against unlimited resale and sharing of MTS and WATS.[11] We found that restrictions on resale and sharing of the services artificially segmented the PSN market by preventing arbitrage.[12]

5. AT&T filed a new tariff in September 1980, which included, *inter alia*, proposed rate increases of 75 percent to implement this Commission's *Resale and Shared Use Order*.[13] We, however, found that AT&T had failed to adequately encourage off-peak usage, and suspended the tariff for five months. Mindful of the D.C. Court of Appeals' mandate in *MCI v. FCC*, we instituted Phase I of the WATS investigation to examine the time-of-day pricing issue.[14] In the event that the proposed tariff revisions became effective prior to termination of the investigation, we ordered AT&T to keep accurate account amounts received by reason of the revisions. At the conclusion of Phase I in May 1981, we determined that AT&T's failure to incorporate a time-of-day sensitive rate was unlawful. We thus prescribed implementation of a time-of-day sensitive rate structure for WATS and ordered AT&T to file tariff revisions reflecting this prescription.[15] AT&T's restructured WATS rates became effective in May 1981.

B. *Initiation of Phase II*

6. We instituted the *WATS Phase II* proceeding in April 1982 to resolve the remaining rate structure and cost issues designated for investigation after the conclusion of the time-of-day investigation.[16] *WATS Phase II* directed AT&T, *inter alia*, to justify as reasonable under Section 202(a) of the Act the rate differences between WATS and MTS in light of our *Like Services Decision*, and to justify as reasonable under Section 201(a) of the Act its practice of offering its two main PSN services under different rate structures.

7. We stated that we would also consider whether resolution of the Sections 201 and 202 issues would require creation of a unified PSN tariff encompassing both MTS and WATS. We proposed that pricing the major component of WATS and MTS, *i.e.*, PSN use, in the same way for similarly situated customers could reduce the opportunity for price discrimination.[17] Further, we noted, the unbundled nature of a unified tariff has the potential to result in increased choice and lower rates to customers. We invited AT&T to file a sample unified PSN tariff "to assist in the expeditious resolution of the discrimination issues."[18] We stated that AT&T's proposal and responses thereto "may form the basis for further Commission action under Section 205 of the Act, 47 U.S.C. § 205."[19] We also raised questions concerning, *inter alia*, AT&T's group average billing requirement and tapered rate structure.[20]

C. *The Telecommunications Marketplace, 1982 to the Present*

8. Shortly after the release of *WATS Phase II*, several parties[21] petitioned this Commission for deferral of the inquiry. Although the petitioners raised a variety of questions, most argued for postponement on the theory that the *Like Services Decision*, which was said to underlie the WATS investigation, was likely to be overturned. Before we could rule on these petitions, the D.C. Circuit set aside our *Like Services Decision*.[22] After the release of the *Ad Hoc* decision, numerous parties again filed motions asking us to delay, modify or eliminate portions of *WATS Phase II*.

9. Concurrent with our consideration of these pleadings, numerous parties filed petitions with the D.C. Circuit challenging particular provisions of the WATS tariff.[23] That Court denied the petitions, noting that the parties raised issues which were being examined in the pending WATS investigation. The Court noted that its decision in *Ad Hoc* would "require adjustment of the second phase of the WATS tariff investigation."[24] The Court also noted that, after the decision in *MCI v. FCC*, this Commission released the *Resale and Shared Use Order* and established interim cost allocation guidelines for AT&T's interstate offerings.[25] The Court instructed us to establish a time schedule for resolution of this investigation in view of these subsequent developments.[26] We established such a schedule, but numerous developments in the telecommunications marketplace since then delayed the investigation until we could evaluate the impact of these developments.

10. In October 1982, we released a *Clarification Order*,[27] rejecting numerous petitioners' arguments that the *Ad Hoc* decision prevented us from proceeding with the WATS investigation. We decided that completion of the WATS investigation was not dependent on a resolution of the "likeness" issue.[28]

11. In the meantime, our efforts to examine and resolve expeditiously the issues raised in *WATS Phase II* yielded to a series of developments which began with the AT&T divestiture. First, in January 1982, AT&T entered into an agreement with the Department of Justice to settle a pending antitrust case through the entry of a consent decree. That decree or Modification of Final Judgment (MFJ) was subsequently entered by the United States District Court for the District of Columbia with certain modifications.[29] The MFJ required that AT&T divest itself of the Bell Operating Companies (BOCs) and that the divested BOCs provide access for Other Common Carriers (OCCs) that is equivalent to the access they provided for AT&T's MTS and WATS. The BOCs were required to introduce such "equal access" by September 1984 and to provide equal access in all of their exchanges by September 1, 1986. The MFJ thus promised to remove AT&T's ability to exclude competition in interexchange services.

12. Second, we released our Access Charge Orders in CC Docket No. 78-72.[30] That docket established a single uniform mechanism through which local telephone exchange companies would recover the costs of providing access services needed to complete interstate and foreign telecommunications. The access charge plan, which became effective in January 1984, reflected our efforts to adapt existing compensation mechanisms to rapidly changing telecommunications technologies and market dynamics. In keeping with the MFJ, we sought to allow full and fair competition in interexchange services, and the benefits such competition would provide to consumers.

13. During this same period, the telecommunications industry experienced tremendous growth in resale services. In a Notice of Inquiry released three years after our *Resale and Shared Use Order*,[31] this Commission cited the rapid growth of resellers as an important development in the telecommunications marketplace, owing in large part to Commission and court-approved entry by new private and common carriers into a wide range of services, technologies, and facilities arrangements.[32] We observed that carriers that resell AT&T's services typically engage in arbitrage, often by leasing private lines or obtaining WATS from AT&T and selling use of these lines for public switched services (similar to MTS). While the rates charged by resellers are influenced by AT&T's rates and rate structures, the existence of resale carriers decreases AT&T's ability profitably to charge disparate rates for services which are close supply substitutes. Consequently, we observed, many of AT&T's new rivals, although smaller than AT&T, are able to expand their facilities and revenues.

14. As a complement to our *Resale and Shared Use Order* (removing restrictions on resale and shared use relating to interstate WATS), this Commission in 1983 declared that tariff provisions restricting resale and sharing restrictions on WATS used for the intrastate distribution of interstate communications, whether by a common carrier or private entity, were unjust, unreasonable and discriminatory.[33] The following year, in implementing the access charge plan, this Commission assured that local exchange carriers applied appropriate access charges for resold WATS services.[34]

15. Pursuant to a recommendation by a federal - state joint board, this Commission in 1986 ordered the direct assignment of WATS access lines, in lieu of their treatment as common lines. As a result, resellers became fully subject to access charges.[35] While this modification may have inhibited resellers' ability to profitably arbitrage between various AT&T services, the transition to full access charges was phased in[36] to allow resellers to formulate appropriate responses -- such as reconfiguring their networks to enhance service possibilities. Moreover, by providing for a temporary dichotomy between carrier common line originating and terminating charges (which resulted in the originating rate becoming 0),[37] this Commission encouraged AT&T to make available services using switched access at both ends which provided lower usage charges (after payment of an appropriate monthly charge), such as Pro America II and III. Concurrent with these changes, AT&T made available other services which were attractive to resellers (as well as carriers who combined resale with provision of service over their own facilities), such as Megacom.[38] In addition, AT&T expanded its menu of services to include Reach Out America for residential customers, Pro America I for small business customers, and Software Defined Network (SDN) for large business customers.

16. Against this backdrop of an increasingly open resale environment, AT&T revised its WATS and MTS tariffs to reflect the changing telecommunications industry. In October 1983, AT&T filed new WATS and MTS tariffs (with a scheduled effective date of January 1, 1984) to reflect the divestiture of the Bell System and the impact of the exchange carriers' access tariffs. In December 1983, we

suspended both proposed tariffs and commenced an investigation into their lawfulness.[39] We released a Memorandum Opinion and Order in May 1984, concluding, *inter alia*, that AT&T had overstated its projected 1984 MTS/WATS costs and had understated its projected 1984 revenues for these services. Based on this analysis, we prescribed a 6.1 percent across-the-board MTS/WATS rate reduction.[40] Since 1984, overall MTS and WATS rates have been reduced by approximately 35 percent.[41]

17. As noted above, AT&T in 1983 also revised its MTS tariff to introduce optional flat-rate pricing for MTS users during off-peak hours. These offerings contained the first flat rates ever offered for MTS. Concluding that the experimental plans improved network efficiency, AT&T filed a block-of-time optional calling plan for MTS customers called Reach Out America. AT&T later offered other options to MTS customers under the Pro America plans and ReadyLine Service. These new AT&T services, along with Megacom, SDN, and WATS, now occupy points along a continuum offering voice service by a mixture of common and dedicated facilities and providing a wide menu of options to customers. In addition, OCCs and resellers now offer competitive service alternatives to MTS.[42]

18. Several changes brought about by the MFJ or this Commission have made it easier for OCCs to compete with AT&T's services. One of the most important of these changes is this Commission's access charge plan, referenced above, which sought to eliminate inequitable aspects of interstate rates by establishing a single uniform mechanism through which interexchange carriers and end users would pay for access to local telephone company facilities used to complete interstate service offerings. Another important change was brought about by the Competitive Carrier Rule Making.[43] In that proceeding, this Commission applied streamlined regulation to non-dominant carriers, thus reducing the regulatory burdens on the OCCs as they sought to compete with AT&T. Other developments include the conversion of local exchange end offices to equal access pursuant to the MFJ and Commission Order,[44] our directive that no restrictions be imposed on WATS lines that are not imposed on other special access lines,[45] and our effort to encourage competition in the 800 service market.[46]

19. In sum, then, the telecommunications marketplace of today is vastly different from the marketplace of 1982. No longer are customers' choices limited in practical effect to AT&T WATS or MTS. AT&T, MCI, US Sprint, and other carriers now offer a wide range of service alternatives to MTS. Further, unlimited resale has been effective both in providing opportunities previously unavailable to MTS customers and in driving the rates for WATS service toward costs.

III. DISCUSSION

20. We initiated the *Phase II* proceeding to determine whether WATS rates were unreasonable in relation to MTS, and, if so, whether we should prescribe as a remedy a unified tariff for AT&T services using the public switched network. Even before the *WATS Phase II* pleading cycle was completed, however, the telecommunications marketplace had begun to experience the effects of the proposed AT&T divestiture. For this reason we have not followed the timetable for resolution of this proceeding that we established in response to the D.C. Circuit's directions in *Southern Pacific*. *See* para. 9, *supra*. We found it impracticable and unwise to attempt to reach a definitive resolution of questions that had been designated for investigation in a vastly different environment. Marketplace forces more promptly and efficiently addressed the practices we had perceived as unreasonable in the *Phase II* Order than this agency could have in an extensive regulatory proceeding seeking to arrive at a fixed standard. Moreover, in light of the effectiveness of marketplace forces alone, we viewed protracted investigation of the WATS tariff as an inefficient use of this Commission's limited resources. We determined that little additional consumer benefit would result that was not already occurring because of changes in the marketplace. Sufficient time has now passed that we should evaluate the need to continue this proceeding in the changed marketplace.

21. As discussed earlier, the changes relevant to the need to pursue this investigation began with the AT&T divestiture. Divestiture acted as a catalyst, prompting changes in our regulation of the telecommunications industry. This Commission's access charge plan, which became effective simultaneously with divestiture, reflected our effort to allow full and fair competition in interexchange services. The growth of resellers brought the lower prices of WATS service to individual customers. Because of the presence of WATS resellers, AT&T's ability to charge different rates for services which are close supply substitutes was significantly decreased.

22. We believe that the arbitrage from WATS resale has substantially reduced the possibility of price discrimination. Effective price discrimination requires some barriers to arbitrage. If a service can be resold freely, then price discrimination is limited to the transaction costs of resale. In the case of WATS, entry into the resale market is easy and the costs of resale remain modest -- even though these costs have changed over time.[47] Moreover, the competitive pressures of resale and competition have encouraged development of the many new services and options available to smaller customers, such as Reach Out America. Consequently, WATS prices are continually being forced into a reasonably close relationship with costs. Further, price discrimination is unlikely when there are numerous competitive service alternatives to MTS in the telecommunications marketplace.

23. Finally, market conditions in a post-divestiture environment also served to facilitate competition in the MTS arena. Heightened competition and technological development in turn led to the proliferation of new, lower-priced services, which are better suited to customer needs. AT&T and its competitors now offer numerous service alternatives, providing a variety of options to customers. The telecommunications marketplace has evolved into an arena where AT&T's ability to discriminate unreasonably by means of its WATS rates has been effectively curtailed by the availability of competitive service offerings and by an open resale environment.

24. Having reviewed AT&T's current WATS tariff in light of this unprecedented change, we conclude that prescription of a unified PSN tariff is not warranted. As we indicated in *WATS Phase II*, our concern about the expeditious resolution of the price discrimination issue prompted us to consider creating a unified PSN tariff which would encompass both WATS and MTS services. However, in light of our finding that changes in the marketplace have made discrimination unlikely, we find

it unnecessary to pursue this inquiry. Nor do we believe that a unified PSN tariff would provide significant benefits to customers not achieved through normal tariff review, the requirement of resale, and competition. Indeed, our prescription of a unified tariff could unnecessarily restrict the development of other new service options in the competitive environment of the telecommunications marketplace.

25. In terminating the second phase of the WATS investigation, we also terminate the accounting orders imposed on AT&T at the start of our investigation without assessing refund liability.

IV. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED that the investigation of Tariff F.C.C. No. 2, Wide Area Telecommunications Service (WATS), in CC Docket Nos. 79-154 and 80-765, and the related accounting orders, ARE TERMINATED.

27. IT IS FURTHER ORDERED that the General Counsel shall inform the United States Court of Appeals for the District of Columbia of the Commission's action in this proceeding and shall furnish copies of this Order to the Court.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] American Telephone and Telegraph Co., 89 FCC 2d 889 (1982) (*WATS Phase II), clarified*, 91 FCC 2d 339 (1982) (*Clarification Order), further clarification denied*, Mimeo CC-1195, Dec. 6, 1982, *review denied sub nom. Southern Pacific Communications Co. v. FCC*, 682 F.2d 232 (D.C. Cir. 1982)(*Southern Pacific).*

[2] In 1961, WATS Service consisted only of Outward WATS; in 1967, AT&T introduced Inward WATS. Outward WATS is now known as AT&T WATS Service. Inward WATS is now AT&T 800 Service.

[3] American Telephone and Telegraph Co., 37 FCC 2d 688 (1964) (recommended decision of the Chief, Common Carrier Bureau), *recommendation adopted*, 39 FCC 2d 475 (1965) (questioning, *inter alia*, the absence of usage sensitive rates).

[4] American Telephone and Telegraph Co., 46 FCC 2d 81 (1974).

[5] American Telephone and Telegraph Co., 59 FCC 2d 671 (1976).

[6] American Telephone and Telegraph Co., 66 FCC 2d 9 (1977) (*Rejection Order), recon. denied*, 69 FCC 2d 1672 (1978), *remanded, MCI Telecommunications Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980) (*MCI v. FCC).* In our 1978 decision on reconsideration of the *Rejection Order*, we established a 1979 date by which AT&T was to submit a restructured WATS tariff. AT&T responded with tentative plans for a new tariff. At that time, we instituted a separate inquiry in Docket 79-154, to solicit public comment on AT&T's proposal.

[7] American Telephone and Telegraph Co., 70 FCC 2d 593 (1978), *recon. denied*, 79 FCC 2d 10 (1980) (*Like Services Decision).*

[8] *MCI v. FCC*, 627 F.2d at 345. MCI's request occurred in the context of an petition for review of the Commission's 1977 *Rejection Order.*

[9] 627 F.2d at 343.

[10] *Id.*

[11] American Telephone and Telegraph Co., 83 FCC 2d 167 (1980) (*Resale and Shared Use Order), recon. denied*, 86 FCC 2d 820 (1981). Also in 1980, this Commission adopted an interim AT&T cost allocation manual, intended, *inter alia*, to aid in developing equitable WATS rates. *See* American Telephone and Telegraph Co., 84 FCC 2d 384, *recon. denied*, 86 FCC 2d 667 (1981), *aff'd sub nom. MCI Telecomm. Corp. v. FCC*, 675 F.2d 408 (D.C. Cir. 1982).

[12] 83 FCC 2d at 174-76. Arbitrage is the purchase of a product at one price and the resale of it at a higher price to other customers. The availability of arbitrage limits a carrier's ability to charge different prices for the same product.

[13] 83 FCC 2d at 167, 172.

[14] American Telephone and Telegraph Co., 84 FCC 2d 158 (1980). That Order directed AT&T, *inter alia*, to provide economic cost support data for WATS recalculated in accordance with the recently adopted interim cost allocation manual. 84 FCC 2d at 196.

[15] American Telephone and Telegraph Co., 86 FCC 2d 820 (1981), *recon. & stay denied*, 86 FCC 2d 883 (1981), *stay denied*, 89 FCC 2d 889 (1982), *review denied sub nom. Southern Pacific Communications v. FCC*, 682 F.2d 232.

[16] *See* note 1, *supra.*

[17] 89 FCC 2d at 899.

[18] *Id.* at 902.

[19] *Id.*

[20] Under the taper, increasing discounts are given for increasing hours of usage within the business day and evening periods. AT&T originally justified the tapered WATS structure on the ground that the taper reflected peak/off-peak usage.

[21] Ad Hoc Telecommunications Users Committee, Aeronautical Radio, Inc., Aerospace Industries Association of America, American Telephone and Telegraph Company, Avis, Inc., Budget Rent-A-Car Corporation and National Car Rental Systems, Inc., Committee of Corporate Telecommunications Users, General Services Administration, and United States Transmission Systems, Inc.

[22] *Ad Hoc Telecommunications Users Comm. v. FCC*, 680 F.2d 790 (D.C. Cir. 1982) (*Ad Hoc).* The Court remanded the proceeding because it rejected our comparison of Outward WATS and Inward WATS with MTS.

[23] *Southern Pacific*, 682 F.2d 232 (D.C. Cir. 1982).

[24] *Id.* at 235.

[25] *Id.* at 234.

[26] *Id.* at 235.

[27] *AT & T*, 91 FCC 2d 339.

[28] We noted:

> An attempt to complete our like service review would necessarily delay completing the WATS investigation because the same people would have to work on both proceedings. Because of this potential for delay and since,

as discussed below, a like service finding is not necessary to our investigation of WATS, we shall not resolve the like service inquiry before moving ahead here.

Clarification Order at 344.

[29] *United States v. AT & T*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom, Maryland v. U. S.*, 103 S.Ct. 1240 (1983).

[30] MTS/WATS Market Structure, CC Docket No. 78-72, Phase I, Third Report and Order, *modified on reconsideration*, 97 FCC 2d 682 (1984), *modified on further reconsideration*, 97 FCC 2d 834 (1984), *aff'd in principal part and remanded in part, Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1224, 1225 (1985), *modified on further reconsideration*, 49 Fed. Reg. 46,383 (1984), 50 Fed. Reg. 18,249 (1985), *aff'd on further reconsideration*, 50 Fed. Reg. 43,707 (1985); *appeal docketed, US Telephone, Inc. v. FCC*, No. 84-1115 (D.C. Cir. Mar. 23, 1984).

[31] Long-Run Regulation of AT&T's Basic Domestic Interstate Services, CC Docket No. 83-1147, Notice of Inquiry, 95 FCC 2d 510 (1983) *(Notice of Inquiry)*.

[32] *See e.g*, Second Computer Inquiry, 77 FCC 2d 384, *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982)., *cert. denied*, 103 S.Ct. 2109 (1983).

[33] AT&T and the Bell System Operating Companies' Restrictions on Resale and Sharing of Switched Services used for Completion of Interstate Communications, FCC 83-40, released Feb. 4, 1983, *aff'd, NARUC v. FCC*, 746 F2d 1492 (D.C. Cir. 1984).

[34] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, FCC 84-51, released Feb. 17, 1984. In addition, this Commission declared that local exchange carriers cannot apply carrier common line charges to inward WATS and WATS-type services. Application of Certain Access Charge Provisions to Resold MTS/WATS and MTS/WATS-Type Services, released Dec. 18, 1985. These policies augmented those in force prior to adoption of the access charge plan. *See e.g.*, AT&T Revisions to Bell Systems Operating Companies Tariff FCC N0. 8, Exchange Network Facilities for Interstate Access (ENFIA), Mimeo No. 001153, released May 29, 1981.

[35] *See* WATS-Related and Other Amendments of Part 69 of the Commission's Rules, CC Docket No. 86-1, FCC 86-115, released Mar. 21, 1986 *(March 21 Order)*. Formerly, WATS resellers were assessed the business rate in the applicable intrastate local exchange company tariff.

[36] Payment of full access charges was excused until January 1, 1987. *March 21 Order* at paras. 27, 28.

[37] *March 21 Order* at Section VI.

[38] Rates for Megacom service, which involved the use of dedicated line to obtain access, were predicated upon payment of a monthly recurring charge and reduced service charges.

[39] Memorandum Opinion and Order, Docket No. 83-1145, FCC 83-470, released Oct. 19, 1983, *recon. denied*, FCC 83-568, released Dec. 29, 1983.

[40] Memorandum Opinion and Order, Docket No. 83-1145, Phase I, and CC Docket No. 78-72, Phase I, FCC 84-201, released May 15, 1984.

[41] Furthermore, since the initiation of *Phase II*, AT&T terminated group average billing -- a practice which we deemed "one of the most controversial issues" in *Phase II. WATS Phase II*, 89 FCC 2d at 904.

[42] For example, MCI Communications Corporation (MCI) offers Execunet, US Sprint Communications Company (US Sprint) offers Dial 1 in equal access areas, and Allnet Communications, Inc., offers Allnet MTS.

[43] Competitive Carrier Rule Making, 85 FCC 2d 1 (1980) (First Report and Order), 91 FCC 2d 1 (1980), *recon.*, FCC 83-69 (released Mar. 21, 1983), Mimeo No. 012 (released Oct. 6, 1983) (Third Report and Order), FCC 83-481 (adopted Oct. 19, 1983) (Fourth Report and Order).

[44] *See* MTS and WATS Market Structure, CC Docket No. 78-72, Phase III, Report and Order, 101 FCC 2d 860 (1985).

[45] *See* Midyear 1986 Access Tariff Filings, Memorandum Opinion and Order, Mimeo No. 4621, released May 20, 1986 *(May 20 Order)*, *recon.*, Midyear 1986 Access Tariff Filings, Memorandum Opinion and Order, 1 FCC Rcd 1247 (1986).

[46] In 1986, this Commission initiated a Rule Making proceeding to examine the local exchange carriers' provision of 800 access service to facilitate interexchange carrier competition in the 800 service market. *See* Provision of Access for 800 Service, Notice of Proposed Rule Making, CC Docket No. 86-10, 102 FCC 2d 1387 (1986); Supplemental Notice of Proposed Rule Making, 3 FCC Rcd 721 (1988); Report and Order, 4 FCC Rcd 2824 (1989). Pending development of a data base, we have granted waivers of Part 69 of our Rules to numerous carriers to permit the establishment of a separate rate element for the recovery of interim 800 service costs. *See, e.g.*, Interim 800 Exchange Access Tariffs, CC Docket No. 86-279, Memorandum Opinion and Order, Mimeo No. 5586, released July 3, 1986 (granting Bell Atlantic Telephone Companies a waiver of Part 69).

[47] It is possible that those transaction costs were even artificially low before this Commission began applying the same access rate elements to resellers as to other carriers. *See* para. 15, *supra*. Indeed, an effect of this step in unifying the application of access charges has been to encourage resellers to examine the newer services which competition and the access program have helped make available, *e.g.*, AT&T's Megacom and SDN offerings, and the services of other interexchange carriers.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-506

In the Matter of

Amendment of Section 73.202(b), RM-6446
Table of Allotments,
FM Broadcast Stations.
(Martin, South Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 16, 1989; Released: July 6, 1989

By the Chief, Allocations Branch:

1. At the request of the South Dakota State Board of Directors for Educational Television (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 6226 (1988), proposing the allotment of Channel 273C1 to Martin, South Dakota, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received. Channel 273C1 can be allotted to Martin in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by allotting Channel 273C1 to Martin, South Dakota, since it could provide the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 21, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Martin, South Dakota	273C1

3. The window period for filing applications will open on **August 22, 1989,** and close on **September 21, 1989.**

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 43-10-30 and West Longitude 101-44-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-324

In the Matter of

Amendment of Section 73.202(b), RM-6368
Table of Allotments,
FM Broadcast Stations.
(Fort Bridger, Wyoming)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 15, 1989; Released: July 6, 1989

By the Chief, Allocations Branch:

1. At the request of Jim Dunker (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 4279 (1988), proposing the allotment of Channel 257A to Fort Bridger, Wyoming, as that community's first local FM service. Petitioner submitted late-filed supporting comments restating his intention to apply for the channel.[1] In addition, Honorable Malcolm Wallop, Member of the United States Senate, filed supporting comments.

2. Channel 257A can be allotted to Fort Bridger in compliance with the Commission's minimum distance separation requirements.[2] Thus, we believe the public interest would be served by the allotment of Channel 257A to Fort Bridger, as a first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 21, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Fort Bridger, Wyoming	257A

3. The window period for filing applications will open on **August 22, 1989,** and close on **September 21, 1989.**

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] We have accepted the late-filed comments in order to permit the petitioner to restate his interest in applying for the allotment.

[2] The reference coordinates are 41-19-06 and 110-22-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-196

In the Matter of

Amendment of Section 73.202(b),	RM-6212
Table of Allotments,	RM-6451
FM Broadcast Stations.	RM-6452
(Haltom City, Greenville and Weatherford, Texas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 16, 1989; Released: July 6, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of Bluebonnet Radio Broadcasters, Inc. (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 2794 (1988), proposing the allotment of Channel 227C2 to Haltom City, Texas, as that community's first local FM service. In response to the *Notice*, petitioner filed supporting comments restating its intention to apply for the channel. Randy Bell also submitted supporting comments expressing an interest in applying for Channel 227C2 at Haltom City. Crest Communications Company ("Crest"), licensee of AM Station KZEE[2] at Weatherford, Texas, and First Greenville Corp. ("First Greenville"), licensee of Station KIKT-FM, Channel 228A at Greenville, Texas, filed counterproposals.[3] Petitioner and Crest filed reply comments.

2. Crest, in its counterproposal, suggests the allotment of Channel 227A to Weatherford, Texas, as that community's first local FM service. Crest states its interest in applying for the channel, if allotted to Weatherford. It asserts that the Haltom City proposal "will only add to the concentration of FM service in the already over-saturated Dallas/Fort Worth service area." Crest objects to the allotment at Haltom City. Further, Crest claims that the petitioner's proposal presents potential problems to Federal Aviation Administration ("FAA") operations. Crest raises questions concerning the lack of available sites at Haltom City to construct a station because of the potential FAA problems. Bob Lee, Jim M. Pope, Sherry Watson and Harris E. Worcester filed letters in support of the Weatherford proposal. In reply comments, Crest continues to support the Weatherford proposal. Crest also claims preference should be given to providing Weatherford with its "first full time outlet" over Haltom City.

3. In its counterproposal, First Greenville requests the substitution of Channel 228C1 for Channel 228A at Greenville, and the modification of the license for Station KIKT-FM to specify operation on the higher class co-channel.[4] In addition, First Greenville proposes the allotment of Channel 227A to Weatherford and states an intention to apply for the channel.

4. In reply comments, petitioner asserts that the allegations raised by Crest are unfounded. Petitioner states that like Haltom City, Weatherford is also a "part of the Dallas-Fort Worth Combined Metropolitan Statistical Area." Petitioner disputes Crest's claim that it would prove difficult to obtain FAA clearance for the Haltom City proposal. Petitioner demonstrates in an engineering statement that Channel 227C2 could be sited at Haltom City in an "open area" where transmitter towers already exist. Moreover, petitioner claims that preference should be given to the Haltom City proposal since that community is without a local broadcast service, unlike Greenville and Weatherford. Furthermore, petitioner suggests that the upgrade at Greenville could be accomplished with the allotment of Channel 228 as a Class C2 facilities instead of a Class C1 channel.

DISCUSSION

5. The counterproposals for Greenville and Weatherford are mutually exclusive to the proposal set forth in the *Notice* because the communities are separated by less than the minimum distance requirements of Section 73.207 of the Rules. Greenville and Haltom City are 106.4 kilometers (66.1 miles) apart, whereas first adjacent Class C1 to C2 facilities require 158 kilometers (98 miles). Weatherford and Haltom City are separated by 54.4 kilometers (33.8 miles), whereas co-channel Class A to C2 facilities must be separated by 163 kilometers (101 miles).

6. Haltom City (population 29,014),[5] located in Tarrant County (population 860,880), is devoid of any local broadcast service. Greenville (population 22,161), located in Hunt County (population 66,400), receives local service from co-owned Stations KIKT-FM and KGVL(AM). Weatherford (population 12,049), is located in Parker County (population 44,609), currently receives local broadcast service from fulltime AM Station KZEE.

7. We believe that on the basis of expressions of interest, Greenville, Haltom City and Weatherford are deserving of receiving expanded or new FM service. However, our engineering analysis reveals that the aforementioned proposals provides the only opportunity for the accomplishment of an expanded FM coverage at Greenville or a new FM service at either Haltom City or Weatherford. Thus, we conclude that the proposals must be comparatively considered. We are guided by the allocation criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), which are:

(1) First fulltime aural service
(2) Second fulltime aural service
(3) First local service
(4) Other public interest matters
[Co-equal weight given to priorities (2) and (3)]

8. We find that none of the allotments under consideration would provide either first or second fulltime aural service, thus eliminating priorities (1) and (2) enumerated above. However, Channel 227C2 at Haltom City could provide a first local service to that community, priority (3), whereas Weatherford already has local service provided by Crest's fulltime AM Station WZEE. Thus,

Weatherford and Greenville fall under priority (4). Consequently, Haltom City is afforded the higher priority. After careful consideration of all the information before us, we conclude that Haltom City should be favored over the proposals at Greenville and Weatherford.

9. Channel 227C2 can be allotted to Haltom City, Texas, as that community's first local broadcast service, in compliance with the Commission's minimum spacing requirements with a site restriction of 8.8 kilometers (5.5 miles) north of the community.[6] The restriction is necessary to avoid a short spacing to Station KBTS-FM, Channel 227C at Killeen, Texas.

10. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 21, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Haltom City, Texas	227C2

11. The window period for filing applications will open on **August 22, 1989,** and close on **September 21, 1989.**

12. IT IS FURTHER ORDERED, That the petition of First Greenville Corp., proposing the substitution of Channel 228C1 for Channel 228A at Greenville, Texas, and the allotment of Channel 227A to Weatherford, Texas (RM-6451), IS DENIED.

13. IT IS FURTHER ORDERED, That the petition of Crest Communications Company, proposing the allotment of Channel 227A to Weatherford, Texas (RM-6452), IS DENIED.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Greenville and Weatherford, Texas, have been added to the caption.

[2] Station KZEE(AM) is authorized as a full-time broadcast station.

[3] Public Notice of the counterproposals was given on July 20, 1988, Report No. 1740.

[4] Subsequently, First Greenville filed a supplement to its counterproposal. We shall not consider the supplement since it was submitted well beyond the established comment periods in this proceeding, and First Greenville provided no justification for the late filing. *See* Section 1.415(d) of the Commission's Rules.

[5] Population figures are taken from the 1980 U.S. Census.

[6] The restricted site coordinates are 32-52-38 and 97-14-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VIGO TELECOMMUNICATIONS, INC. File No. I-T-C-89-046

Application for authority to resell services of other carriers to provide data communications services via facsimile transmission from the contiguous United States to international points

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 23, 1989; Released: July 7, 1989

By the Chief, International Facilities Division:

1. On January 23, 1989, Vigo Telecommunications, Inc. (Vigo) filed the above-captioned application requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the international switched message telephone services of MCI International, Inc (MCI) and US Sprint Company (US Sprint) to provide international data communications services via facsimile transmission[1] from the contiguous United States to various international points. The application was placed on public notice on February 1, 1989. No comments were received.

DISCUSSION

2. The majority of recent international resale applications granted by the Commission have involved entities seeking authority to provide international switched voice services through the resale of the international switched voice services of existing international carriers. The subject application differs from these applications in that the applicant does not seek authority to resell international switched voice services to provide international switched voice service but, to provide international facsimile service, a non-voice service. The request to provide data services by means of facsimile transmission raises a number of issues which are not present when considering applications for resale of a service for provision of the same service.

3. For example, a telephone call from the United States to another country provided by a carrier reselling the switched voice service of AT&T or other U.S. carrier is not likely to produce operational or economic effects on the foreign correspondent that differ from those that would occur if the U.S. customer placed the call directly with the U.S. carrier whose service is being resold. Under such circumstances, there would appear to be little or no need for such a U.S. resale carrier to obtain its own operating agreements with the foreign correspondent of the U.S. carriers whose services are being resold. Because of this factor and the fact that the reselling carrier is bound by the terms and conditions of the tariffs of the carriers whose services are being resold, we retain sufficient control over the resold voice service by means of our control over the authorizations and tariffs of the carriers whose services are being resold.

4. The resale of one international service, such as switched voice service, to provide a different international service, such as facsimile service, as is the case in this application, could well present a different situation. In such a case, additional action or different equipment may be required on the part of the underlying U.S. carrier's foreign correspondent. Consequently, it is possible that U.S. resale carriers which resell one international service of an underlying U.S. carrier to provide a different international service may be required to obtain operating agreements or other instruments of authorization by the foreign correspondent or other authorities in some countries.[2]

5. We would also note that in its *International Competitive Carrier* decision, the Commission found that each foreign country constituted a separate geographical market.[3] The Commission indicated that this finding was based primarily on the need for a carrier to obtain an operating agreement prior to providing service to a given country.[4] The Commission further found that non-dominant carriers should be required to obtain an initial Section 214 certificate to provide a given service product to a country.[5] Because U.S. resale carriers which provide international services different from the international services being resold may need to obtain operating agreements or other forms of authority from the correspondents or other authorities in the countries where the service will be provided, we believe it is appropriate that such resale carriers be granted initial Section 214 certifications to each country (geographical market) for each service product in accordance with the procedure set forth in the Commission's *International Competitive Carrier* decision.[6]

6. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[7] We find that the market will support additional carriers and that the added competition will be in the public interest.[8] However, we will limit our grant of authority for Vigo to provide international facsimile service by resale of the international switched voice services of MCI and US Sprint,[9] to those points specified in Vigo's letter dated March 16, 1989.[10]

7. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international data services via facsimile transmission by Vigo.

8. Accordingly, IT IS ORDERED that application File No. I-T-C-89-046 IS GRANTED, and Vigo is authorized to:

a. provide international facsimile service by the resale of the International Message Telephone Service set forth in MCI's Tariff F.C.C. No. 1, between the contiguous United States and those points listed in Appendix A; and

b. provide international facsimile service by the resale of the International Message Telephone Service set forth in US Sprint's Tariff F.C.C. No. 1, between the contiguous United States and those points listed in Appendix A.

9. Nothing in this authorization should be construed as authorizing the transmission of money. The transmission of money is not considered to be a common carrier activity.

10. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

11. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

12. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1988)

13. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Points Receiving Vigo's Facsimile Service

For the following countries, Vigo is authorized to use the facilities of MCI International, Inc and the applicable rate under MCI's Tariff F.C.C. No. 1:

Argentina
Brazil
Chile
Costa Rica
Ecuador
Paraguay
Peru
Uruguay

For the following countries, Vigo is authorized to use the facilities of US Sprint and the applicable rate under US Sprint's Tariff F.C.C. No. 1:

Bolivia
Colombia
El Salvador
Guatemala
Honduras
Mexico
Panama
Republic of Dominica
Venezuela

FOOTNOTES

[1] Vigo states it intends to provide this service to customers by receiving an over-the-counter message, letter or document and transmitting it to an international destination. Although such services might incorrectly be construed to include the transmission of money, nothing in this Order should be construed as containing authority for the transmission of money. The transmission of money is not considered to be a common carrier service. Thus, authority for such services is not included in this Order.

[2] For example, in a Memorandum, Opinion and Order, File No. I-T-C-84-081, (released July 3, 1984), the Commission, by delegated authority, granted Instafax International, Inc. (Instafax) authority to provide digital facsimile services to Hong Kong by resale of AT&T's International Message Telecommunications Service. The Order stated that Instafax indicated that it had conducted preliminary discussions with Cable and Wireless (Hong Kong) Ltd., a prospective foreign correspondent in Hong Kong. On July 12, 1984, Instafax filed, pursuant to the provisions of Section 43.51 of the Commission's Rules, 47 C.F.R. Section 43.51, copies of: a Business Registration Certificate issued by the Government of Hong Kong; a Public Non-Exclusive Telecommunications Service License granted by the Office of the Postmaster General of Hong Kong; and an operating agreement between Instafax and Cable and Wireless (Hong Kong) Ltd.

[3] International Carrier Policies, 102 FCC 2d 812 (1985). Order on Reconsideration, 60 RR 2d 1435 (1986).

[4] *Id.* at 828.

[5] *Id.* at 844.

[6] Because the applicant is reselling services rather than acquiring specific facilities, it need not file the circuit addition reports required by Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1987).

[7] *See* Teltec Saving Communications Co., Mimeo No. 3548, n. 2 (released April 4, 1986).

[8] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

[9] In recent decisions authorizing entities to provide international switched voice services of existing U.S. carriers, we have granted the applicants authority to provide switched voice service by resale to all of the points that are currently or may subsequently be listed in the international switched voice service tariffs of the carrier or carriers whose services are being resold. In those situations where the service being provided by a resale carrier is the same as that being resold, we note that there is likely to be little, if any, effect on the foreign correspondent of the U.S. carrier whose service is being resold.

[10] Although Vigo initially requested authority to resell the switched voice services of AT&T in addition to those of MCI and US Sprint, by letter dated March 16, 1989 Vigo indicated its intention to resell only the services of MCI and US Sprint.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-15

In the Matter of

Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM, and Television Stations By Random Selection (Lottery)

ORDER GRANTING MOTION FOR EXTENSION OF TIME FOR FILING REPLY COMMENTS

Adopted: June 27, 1989; Released: June 28, 1989

By the Chief, Mass Media Bureau:

1. On January 30, 1989, the Commission adopted a *Notice of Proposed Rule Making* (*"Notice"*) in the above-captioned proceeding,[1] regarding whether it would serve the public interest to utilize lotteries rather than comparative hearings for selecting among competing applicants for new AM, FM, and television stations. Comments were due on June 8, 1989, and reply comments are currently due on June 30, 1989, pursuant to an *Order* extending the filing deadlines in this proceeding.[2]

2. On June 22, 1989, a motion for extension of time to file reply comments was submitted by the Federal Communications Bar Association ("FCBA"). The motion requests that the deadline for filing reply comments be extended to July 17, 1989.

3. The FCBA contends that the requested extension of time is necessary because of the volume of comments filed in this proceeding and the limited time available to review the comments, draft an appropriate pleading, and have such pleading approved by its Executive Committee. In addition, the FCBA states that the term for new officers and Executive Committee members begins on July 1, 1989, and that the extension would enable its new Executive Committee to consider the important issues raised by this proceeding. Finally, the FCBA contends that the extension should not affect the Commission's consideration of this proceeding since it already has a substantial set of comments to review.

4. As set forth in Section 1.46 of the Commission's Rules, it is the policy of the Commission that extensions of time shall not be routinely granted. However, because numerous and extensive comments have already been filed in this proceeding, we believe that it would serve the public interest to grant the limited extension of time requested by the FCBA. We believe that such an extension will not only benefit institutional organizations like the FCBA, which must coordinate the preparation of their reply comments among various committees, but also will give all commenters additional time in which to review the record in this proceeding and to respond to the issues raised. At the same time, because this constitutes the second extension of time granted in this proceeding and parties have already been afforded additional time for the filing of comments and replies, we do not anticipate entertaining any additional time extension requests in this proceeding.

5. Accordingly, IT IS ORDERED THAT the motion for extension of time filed by the Federal Communications Bar Association IS GRANTED.

6. IT IS FURTHER ORDERED THAT the time for the filing of reply comments in MM Docket No. 89-15 IS HEREBY EXTENDED to July 17, 1989.

7. This action is taken pursuant to authority found in Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, and 1.45-46 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTES

[1] 4 FCC Rcd 2256 (1989), *summarized* at 54 Fed. Reg. 11416 (March 20, 1989).

[2] 4 FCC Rcd 3944 (1989); 54 Fed. Reg. 19578 (May 8, 1989). The *Notice* originally provided that comments and reply comments were due on May 8, 1989, and June 22, 1989, respectively.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-549

In the Matter of

North Central and North East Texas
Region 40 Public Safety Plan

ORDER

Adopted: June 22, 1989; Released: July 7, 1989

By the Chief, Private Radio Bureau and the Chief Engineer:

I. INTRODUCTION

1. By this action, we accept the regional public safety plan for the North Central and North East Texas Region, Region 40, subject to the conditions stipulated herein. The requirements for regional public safety plans were contained in the Commission's *Report and Order* in Gen. Docket No. 87-112.[1] The Region 40 Plan is the second regional plan we have accepted[2] and represents the culmination of the efforts of the many public safety organizations that participated in its development.

II. BACKGROUND

2. On December 8, 1983, Congress directed the Commission to develop a plan to ensure that the present and future electromagnetic spectrum requirements of state and local public safety authorities be considered in the agency's spectrum allocations decisions.[3] The Commission, in response to this Congressional directive, subsequently allocated six megahertz of spectrum in the 821-824/866-869 MHz bands for use, nationwide, by public safety authorities. In making this allocation decision, however, the Commission provided that the spectrum would not be made available for licensing until a National Plan was developed to ensure the efficient use of the new allocation.

3. To assist in the development of this National Public Safety Plan, in December of 1986 the Commission established the National Public Safety Planning Advisory Committee (NPSPAC) to involve parties interested in public safety in the planning effort. Then, in May of 1987, following issuance of NPSPAC's *Initial Report*,[4] the Commission released a *Notice of Proposed Rule Making* [5] *(Notice)* proposing rules and policies looking toward the establishment of a National Plan for Public Safety (National Plan). Recognizing that the spectrum needs of public safety agencies differ to some extent throughout the country, the Commission proposed the establishment of regional planning committees to develop plans designed to meet the individual and joint communications needs of public safety agencies within that region. Following the receipt of extensive comments on this proposal as well as NPSPAC's *Final Report*, received on September 9, 1987, the Commission released its *Report and Order* setting forth its National Plan for Public Safety on December 18, 1987.

4. The Commission's *Report and Order* endorsed the regional planning concept proposed in the *Notice* and recommended by NPSPAC as the best method for assuring that the new spectrum allocation is used nationwide as efficiently as possible. To this end, the Commission established fifty-five (55)[6] regions that encompassed all the land area of the United States, including Puerto Rico and the U.S. Virgin Islands. The Commission instructed each region to develop a plan for use of the newly allocated spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in the region. Additionally, the Commission established various procedural and substantive requirements for each regional plan but, at the same time, invested considerable discretion in each area to decide how the public safety spectrum should be used to meet the present and future needs of state and local public safety authorities. The Commission's goal, in this regard, was to provide the various regions with the autonomy necessary to be able to design and construct systems that would meet the unique communications needs of their public safety agencies.

5. After each plan is completed and approved by its regional planning committee, it must be submitted to the Chief, Private Radio Bureau and the Chief Engineer. The plan is then placed on public notice and comments are solicited for a 45-day period. The two Bureaus jointly review each plan in conjunction with any comments submitted. After the review process, if the Bureaus determine that a plan is deficient in any of the required elements or if problems are identified by the comments, the plan is returned to the regional planning committee for further work. Once the two Bureaus have formally accepted a plan, the individual public safety entities can begin applying for licensing in the new 800 MHz spectrum.

III. THE NORTH CENTRAL AND NORTH EAST TEXAS REGION PLAN

6. Region 40 comprises counties in the north central and north east part of the State of Texas.[7] On October 5, 1988, the North Central and North East Texas Region, Region 40, submitted its plan to the Commission for review and approval. On November 3, 1988, we responded by letter stating that one of the elements required in the plan had not been properly addressed. Instead of a frequency specific list, the Region 40 Plan contained a list of initial frequency allotments, based on county and population lines. Plan at Appendix 17, pp. 89-95. By letter of November 21, 1988, Region 40 amended its plan to include the information we requested. The Region 40 Plan, as amended, states that based on the results of a filing window held late last year, sufficient frequencies are available to meet the first round of applicants' needs.[8] Region 40 further amended its plan by submitting a frequency specific list based on its initial filing window.[9]

7. Specifically, the plan provides a summary of its major elements, including interoperability requirements, spectrum efficiency, trunking, applicant prioritization and implementation monitoring. The plan states that the Regional Planning Committee used a computer model, based on the Okumura Propagation Model, to generate a distribution of the most desirable frequencies by county.

Plan at 34-36. In our letter of November 3, 1988, we asked Region 40 to show how the requirements of all eligible entities within the region were considered and met to the degree possible. In response, Region 40's Chairman states:

> During development of the Plan, a frequency specific survey was taken to determine interested eligibles within Region 40. November 1, 1988, was established as the closing date for potential filing of applications from first round applicants. Based on the results of the first round filing, the Regional Planning Committee assures the Commission that sufficient frequencies are available to meet the first round applicants' frequency needs.

The Regional Planning Committee bases its application review and evaluation on the following five factors: evidence of appropriate coordination and use of licensing application forms, system design information, a funding statement, a proposed implementation schedule and an existing frequency statement. Plan at 20. In a general description of how the spectrum is to be allotted among the various eligible users within the region, the Plan explains that the new channels have been initially assigned on a county-by-county basis, correlated to population with a minimum of two frequencies per county. The Committee used this approach to conserve spectrum and create more efficient frequency assignments. Because the Dallas/Fort Worth Metroplex area accounts for 78 percent of Region 40's population, the Regional Planning Committee used it as the starting point for making initial frequency assignments.[10]

8. Like the New York Plan, the North Central and North East Texas Plan has certain criteria that will be used to evaluate the needs of the individual entities and to rank them appropriately in areas where applications outnumber channels available. These criteria are: service, intersystem communications, cooperative systems, implementation (budget) factors, and give-back frequencies. Plan at 78-82. No information was provided on the amount of spectrum that will be left over or the number of give-back frequencies that will be obtained.[11] The Plan states that it was coordinated with the seven adjacent regions. Plan at 11. It offers a detailed description of how the plan puts the spectrum to the best possible use by requiring system design with minimum coverage areas, by allotting frequencies so that maximum frequency reuse and offset channel use may be made and by using trunking.[12]

IV. COMMENTS

9. The Region 40 Plan was placed on Public Notice for comments on December 7, 1988. We received one comment from General Electric Mobile Communications (GE). The Region 40 Regional Communications Planning Committee (Region 40) filed reply comments.

10. GE, in its comments, asks for clarification on two of the five factors used by Region 40 in ranking applications in congested areas where spectrum resources may be exhausted. Specifically, GE asks that Factor 2, the degree of interoperability that is demonstrated, be clarified to specifically refer to crossband patching operations. Otherwise, contends GE, one could misinterpret Factor 2 to mean that one's equipment must be interoperable with that of neighboring jurisdictions. In this case, the manufacturer with the greatest share of the 800 MHz market would have a decided advantage. GE also asks for clarification of Factor 3, the awarding of points based on a cooperative, multi-organization system. GE asks that Region 40 establish "more precise, supplier-neutral criteria" such as a fully-coordinated plan with other agencies to use radio communications to respond to emergencies and other situations where interoperability may be desired. GE Comments at 4. As with Factor 2, GE contends that misinterpretation of Factor 3 could lead to unduly favoring one manufacturer.

11. In its Reply Comments, Region 40 describes Factor 2 as follows:

> "Ability to communicate, in addition to the interoperability channels, includes, but is not limited to, interconnection by means of trunks, tie lines, and such other hard wiring as may be required. This could include crossband patching with agencies using other frequencies." Region 40 Reply Comments at 2. Region 40 states that Factor 3, Cooperative System, is "an 821/866 mhz system participated in by more than one governmental agency, including states, counties, cities, and other governmental subdivisions." Region 40 concludes that GE's interpretation of these factors notwithstanding, nothing in the plan is intended to influence the selection of one manufacturer over another. Region 40 Reply Comments at 2.

V. DISCUSSION

12. We have reviewed the plan submitted for Region 40, as amended, and find that it conforms with the National Public Safety Plan and includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112. The Regional Planning Committee has made a reasonable and good faith effort to satisfy the Commission's requirements. The fact that 78 percent of the region's population of almost 5 million is located in the Dallas/Fort Worth Metroplex area led the Committee to undertake its county-by-county assignment of frequencies. We recognize the special circumstances, including timing, that led Region 40 to file its plan before specific assignments could be included. Nevertheless, by filing a frequency specific list on April 14, 1989, Region 40 demonstrated to us that they had satisfied the needs of initial filing window applicants requesting channels in the new 800 MHz bands. Furthermore, the absence of any negative comments from eligible entities with unmet needs indicates that there are sufficient frequencies available to meet all of the first round applicants' frequency needs, as stated by Region 40 in its letter of November 21, 1989.

13. Regional Planning Committees have the obligation to determine priorities within the regions. To that end, the Region 40 Plan lists the five criteria it uses to rank the applicants in priority order, assuming there will be unmet needs at some future date. They are: type of service, intersystem communications, cooperative systems, system implementation factors (budgetary commitment) and give-back frequencies. GE's concern is that two of these factors could be construed to favor one vendor of communications equipment over all others. Region 40 responds unequivocally to GE that "nothing in the plan is

intended to influence the selection of one manufacturer over another." Region 40 Reply Comments at 2. Selection of equipment is typically accomplished at the user level. Therefore, nothing in a regional plan should dictate equipment selection. We have not found anything in the Region 40 Plan that would bias radio equipment selection.

14. It is, of course, incumbent on adjoining regions to coordinate their planning activities with each other. As stated in our *Report and Order* at paragraph 51, each plan must include " . . . an explanation of how the plan has been coordinated with adjacent regions." In subsequent plans, we will require a complete statement, including the dates of notification and the response from each of those regions. Regional Planning Committees may wish to include copies of letters to meet this requirement. The Region 40 Plan includes a statement that it was submitted to the planning committees of the seven adjacent regions for their review. Plan at 11. We note that the seven adjacent regions, Oklahoma (34), Arkansas (4), Louisiana (18), Houston (51), Austin (49), El Paso (50) and Lubbock (52), not being as far along in their planning processes, may require future coordination with Region 40. The Region 40 Plan is, therefore, accepted subject to appropriate future coordination with its adjacent regions.

VI. CONCLUSION

15. We recognize the effort that went into preparing the Region 40 Plan and commend the Planning Committee for its work. The North Central and North East Texas Region presented a challenge in terms of diversity and population concentration. We were pleased to see Region 40 combine the Okumura Propagation Model with the geographic center of each county and the 40 dBu desired receive signal strength to achieve the most desirable frequency selection. We believe the Region 40 Plan represents a careful balance of the public safety and special emergency mobile communication needs throughout the area and will result in efficient use of the newly allocated 800 MHz Public Safety radio spectrum. This plan is only the second of its kind to be accepted. For entities within its forty-two counties, it marks the first step over the threshold to actual licensing of the frequencies.

16. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Region 40 IS ACCEPTED, conditioned on Region 40's ongoing good faith coordination with adjacent Regions 34, 4, 18, 51, 49, 50 and 52. Accordingly, licensing of the 821-824/866-869 MHz bands may commence immediately in Region 40.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

FOOTNOTES

[1] Report and Order, Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987).

[2] We accepted the New York (Region 8) Public Safety Plan on May 12, 1989.

[3] *See* Federal Communications Commission Authorization Act of 1983, December 8, 1983, P.L. 98-214, 97 Stat. 1467, Section 9(a).

[4] NPSPAC, Initial Report To the Federal Communications Commission, *published in* Appendix B, Notice of Proposed Rule Making, Gen. Docket No. 87-112, 2 FCC Rcd 2869, 2873-92 (1987) (*Initial Report*).

[5] Notice of Proposed Rule Making, Gen. Docket No. 87-112, 2 FCC Rcd 2869 (1987).

[6] The Report and Order established 48 Regions. This number and the boundaries were amended by the Memorandum Opinion and Order, 3 FCC Rcd 2113 (1988).

[7] Those counties include: Cooke, Grayson, Fannin, Lamar, Red River, Bowie, Wise, Denton, Collin, Hunt, Delta, Hopkins, Franklin, Titus, Morris, Cass, Tarrant, Dallas, Palo Pinto, Parker, Rockwall, Kaufman, Rains, Van Zandt, Wood, Smith, Camp, Upshur, Gregg, Marion, Harrison, Panola, Rusk, Cherokee, Anderson, Henderson, Navarro, Ellis, Johnson, Hood, Somervell and Erath.

[8] Letter from Charles O. Bowles, Chairman, Region 40 Public-Safety Communications Planning Committee, dated Nov. 21, 1988.

[9] Letter from Charles O. Bowles, Chairman, Region 40 Public-Safety Communications Planning Committee, dated April 14, 1988.

[10] Plan at 34.

[11] Region 40 has continued to have monthly filing windows but has provided the Commission with the results of only the first one which closed on November 1, 1988.

[12] The Plan obtains maximum frequency reuse by using a computer model, based on the Okumura Propagation Model, to allot frequencies. Further, the Plan limits received signal strength to 41 dBu at each entity's geographical boundary, thus limiting transmit power and antenna height.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-389

In the Matter of

Revision of Part 15 of the rules regarding the operation of radio frequency devices without an individual license

ERRATA

Released: July 7, 1989

The *First Report and Order*, FCC 89-103, released April 18, 1989, 54 Fed. Reg. 17710, April 25, 1989, in the above entitled matter is corrected as follows:

1. The first sentence in paragraph 26 of the text of the *First Report and Order* is corrected to read: "For frequencies above 960 MHz, the proposed limit is the same as that which the Commission recently adopted in GEN Docket No. 86-422 to ensure that emissions from Part 15 devices do not interfere with safety and other sensitive services operating on the existing restricted frequency bands in that area of the spectrum."[10]

2. The last sentence in paragraph 138 of the text of the *First Report and Order* is corrected to read: "As the regulations applicable to TV interface devices were considered in those earlier proceedings, the rules adopted in those proceedings will be incorporated into this Order."

3. Footnote 31 of the text of the *First Report and Order* is corrected to read:

[31] *See, Memorandum Opinion and Order*, Docket No. 86-422, 4 FCC Rcd 1981 (1989).

4. Footnote 58 of the text of the *First Report and Order* is corrected to read:

[58] While the current regulation, 47 CFR Section 15.66, specifies a 12 dB UHF noise figure, the Commission orders that amended this section and implemented the 12 dB noise figure were overturned by the U. S. Court of Appeals for the District of Columbia Circuit on September 17, 1980. *See*, Electronic Industries Ass'n. Consumer v. FCC, 636 F.2d 689 (D.C. Cir. 1980). Thus, the current noise figure requirement, which is being retained in this Order, is 14 dB.

5. Section 2.1033, paragraph (b)(7), is corrected to read as follows:

Section 2.1033 Application for certification.

* * * * *

(b) * * *

* * * * *

(7) A sufficient number of photographs to clearly show the exterior appearance, the construction, the component placement on the chassis, and the chassis assembly. The exterior views shall show the overall appearance, the antenna used with the device (if any), the controls available to the user, and the required identification label in sufficient detail so that the name and FCC identifier can be read. In lieu of a photograph of the label, a sample label (or facsimile thereof) may be submitted together with a sketch showing where this label will be placed on the equipment. Photographs shall be 8 by 10 inches in size. Smaller photographs may be submitted provided they are sharp and clear, show the necessary detail, and are mounted on paper between 8 by 10 1/2 inches and 8 1/2 by 11 inches in size. A sample label or facsimile together with the sketch showing the placement of this label shall be on the same size paper.

* * * * *

6. Section 2.1043, paragraphs (b), (b)(1), (b)(2), and (b)(3), are corrected to read as follows:

Section 2.1043 Changes in certificated equipment.

* * * * *

(b) Two classes of permissive changes may be made in certificated equipment without requiring a new application for and grant of certification. Neither class of change shall result in a change in identification.

(1) A Class I permissive change includes those modifications in the equipment which do not degrade the characteristics reported by the manufacturer and accepted by the Commission when certification is granted. No filing with the Commission is required for a Class I permissive change.

(2) A Class II permissive change includes those modifications which degrade the performance characteristics as reported to the Commission at the time of the initial certification. Such degraded performance must still meet the minimum requirements of the applicable rules. When a Class II permissive change is made by the grantee, he shall supply the Commission with complete information and the results of tests of the characteristics affected by such change. The modified equipment shall not be marketed under the existing grant of certification prior to acknowledgement by the Commission that the change is acceptable.

(3) Permissive changes, as detailed above, shall be made only by the holder of the grant of certification. Changes by any party other than the grantee require a new application for and grant of certification.

* * * * *

7. Section 15.37 is corrected to read as follows:

Section 15.37 Transition provisions for compliance with the rules.

Equipment may be authorized, manufactured and imported under the rules in effect prior to June 23, 1989, in accordance with the following schedules:

(a) *For all intentional and unintentional radiators, except for receivers:* Radio frequency equipment verified by the responsible party or for which an application for a grant of equipment authorization is submitted to the Commission on or after June 23, 1992, shall comply with the regulations specified in this Part. Radio frequency equipment that is manufactured or imported on or after June 23, 1994, shall comply with the regulations specified in this Part.

(b) *For receivers:* Receivers subject to the regulations in this Part that are manufactured or imported on or after June 23, 1999, shall comply with the regulations specified in this Part. However, if a receiver is associated with a transmitter that could not have been authorized under the regulations in effect prior to June 23, 1989, *e.g.*, a transmitter operating under the provisions of Sections 15.209 or 15.249 (below 960 MHz), the transition provisions in this Section do not apply. Such receivers must comply with the regulations in this Part.

(c) There are no restrictions on the operation or marketing of equipment complying with the regulations in effect prior to June 23, 1989.

8. Section 15.113, paragraph (f), is corrected to read as follows:

Section 15.113 Power line carrier systems.

* * * * *

(f) The provisions of this Section apply only to systems operated by a power utility for general supervision of the power system and do not permit operation on electric lines which connect the distribution substation to the customer or house wiring. Such operation can be conducted under the other provisions of this Part.

9. Section 15.115 is corrected by adding the following note at the end of paragraph (b)(3), to read as follows:

Section 15.115 TV interface devices, including cable system terminal devices.

* * * * *

(b) * * *

(3) * * *

Note: Cable-ready video cassette recorders continue to be subject to the provisions for general TV interface devices pending further action by the Commission.

* * * * *

10. Section 15.209, paragraph (a), is corrected to read as follows:

Section 15.209 Radiated emission limits, general requirements.

(a) Except as provided elsewhere in this Subpart, the emissions from an intentional radiator shall not exceed the field strength levels specified in the following table:

Frequency (MHz)	Field strength (microvolts/ meter)	Measurement distance (meters)
0.009-0.490	2400/F(kHz)	300
0.490-1.705	24000/F(kHz)	30
1.705-30.0	30	30
30-88	100 **	3
88-216	150 **	3
216-960	200 **	3
Above 960	500	3

** Except as provided in paragraph (g), fundamental emissions from intentional radiators operating under this Section shall not be located in the frequency bands 54-72 MHz, 76-88 MHz, 174-216 MHz or 470-806 MHz. However, operation within these frequency bands is permitted under other sections of this Part, *e.g.*, Sections 15.231 and 15.241.

* * * * *

11. Section 15.231, paragraphs (b)(2) and (b)(3), are corrected to read as follows:

Section 15.231 Periodic operation in the band 40.66-40.70 MHz and above 70 MHz.

* * * * *

(b) * * *

(1) * * *

(2) Intentional radiators operating under the provisions of this Section shall demonstrate compliance with the limits on the field strength of emissions, as shown in the above table, based on the average value of the measured emissions. As an alternative, compliance with the limits in the above table may be based on the use of measurement instrumentation with a CISPR quasi-peak detector.

The specific method of measurement employed shall be specified in the application for equipment authorization. If average emission measurements are employed, the provisions in Section 15.35 for averaging pulsed emissions and for limiting peak emissions apply. Further, compliance with the provisions of Section 15.205 shall be demonstrated using the measurement instrumentation specified in that section.

(3) The limits on the field strength of the spurious emissions in the above table are based on the fundamental frequency of the intentional radiator. Spurious emissions shall be attenuated to the average (or, alternatively, CISPR quasi-peak) limits shown in this table or to the general limits shown in Section 15.209, whichever limit permits a higher field strength.

* * * * *

12. Section 15.233, paragraphs (b), (d) and (e), are corrected to read as follows:

Section 15.233 Operation within the bands 46.60-46.98 MHz and 49.66-50.0 MHz.

* * * * *

(b) An intentional radiator used as part of a cordless telephone system shall operate on any frequency within 10 kHz of one or more of the following frequency pairs:

Channel	Base Transmitter (MHz)	Handset Transmitter (MHz)
1	46.610	49.670
2	46.630	49.845
3	46.670	49.860
4	46.710	49.770
5	46.730	49.875
6	46.770	49.830
7	46.830	49.890
8	46.870	49.930
9	46.930	49.990
10	46.970	49.970

(c) * * *

(d) The fundamental emission shall be confined within a 20 kHz band centered on the frequencies listed in paragraph (b), as adjusted by the frequency tolerance of the transmitter at the time testing is performed. Modulation products outside of this 20 kHz band shall be attenuated at least 26 dB below the level of the unmodulated carrier or to the general limits in Section 15.209, whichever permits the higher emission levels. Emissions on any frequency more than 10 kHz removed from this 20 kHz band shall consist solely of unwanted emissions and shall not exceed the general radiated emission limits in Section 15.209. Tests to determine compliance with these requirements shall be performed using an appropriate input signal as prescribed in Section 2.989 of this Chapter.

(e) All emissions exceeding 20 microvolts/meter at 3 meters are to be reported in the application for certification.

* * * * *

13. Section 15.239, paragraph (d), is corrected to read as follows:

Section 15.239 Operation in the band 88-108 MHz.

* * * * *

(d) A custom built telemetry intentional radiator operating in the frequency band 88-108 MHz and used for experimentation by an educational institute need not be certified provided the device complies with the standards in this Part and the educational institution notifies the Engineer in Charge of the local FCC office, in writing, in advance of operation, providing the following information:

* * * * *

14. Section 15.251, paragraph (f), is corrected to read as follows:

Section 15.251 Operation within the bands 2.9-3.26 GHz, 3.267-3.332 GHz, 3.339-3.3458 GHz, and 3.358-3.6 GHz.

* * * * *

(f) In addition to the labelling requirements in Section 15.19(a), the label attached to the AVIS transmitter shall contain a third statement regarding operational conditions, as follows:

> . . . and, (3) during use this device (the antenna) may not be pointed within ± ** degrees of the horizontal plane.

The double asterisks in condition three (**) shall be replaced by the responsible party with the angular pointing restriction necessary to meet the horizontal emission limit specified in paragraph (b).

* * * * *

15. In addition to the above corrections, it should be noted that the reference in Appendix C to the restricted frequency band 167.72-173.3 MHz should read 167.72-173.2 MHz.

All of the above corrections, except for Sections 15.115 and 15.233, resolve editorial errors that occurred during publication or provide additional clarity. The correction to Section 15.115 incorporates the provisions contained in the Memorandum, Opinion and Order in Gen. Docket No. 85-301 (adopted October 13, 1988, FCC 88-331, 3 FCC Rcd 6491 (1988)). The correction to Section 15.233 incorporates the provisions contained in the Order adopted by the Commission on November 17, 1987 (FCC 87-355, 2 FCC Rcd 7276 (1987)). Those provisions were omitted by error.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 2 to Revise
Footnotes G27 and G30 as Requested
By the National Telecommunications
and Information Administration.

ORDER

Adopted: June 19, 1989; **Released: July 7, 1989**

By the Chief Engineer:

1. Effective January 25, 1989, the National Telecommunications and Information Administration has amended the National Table of Frequency Allocations by revising Government footnotes G27 and G30. This revision is intended to better reflect the intent and practice of limiting the fixed and mobile services in the 225-328.6 and 335.4-399.9 MHz bands to the military services. The affected bands are exclusive Government allocations for fixed and mobile services.

2. Non-Government entities are not affected by the revised footnotes. Accordingly, IT IS ORDERED that Section 2.106 of the Commission's Rules, 47 CFR Section 2.106, is amended by deleting footnote G30 and adding footnote G27 in column 4 for the 225.328.6 and 335.4-399.9 MHz bands and by substituting the amended text for footnotes G27 and G30 to the list of Government footnotes at the end of the table. This action is taken pursuant to the authority of 47 USC Sections 154(i), 302 and 303, and pursuant to authority delegated to the Chief Engineer in Section 0.241 of the Commission's Rules. Because the revision of footnotes G27 and G30 is nonsubstantive, the notice and comment provisions as well as the effective date requirements of the Administrative Procedure Act are inapplicable. This action becomes effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

APPENDIX

Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

Section 2.106, the Table of Frequency Allocations, is amended by deleting footnote G30 and adding footnote G27 to column 4 for the 225-328.6 and 335.4-399.9 MHz bands and substituting the amended text for footnotes G27 and G30 to the list of footnotes at the end of the table as follows:

Section 2.106 Table of Frequency Allocations

United States Table

Government
Allocation (MHz)
(4)

* * *

225.0-328.6

FIXED.
MOBILE.

501 592 642 644
G27 G100

* * *

335.4-399.9

FIXED.
MOBILE.

G27 G100

* * *

* * * * *

Government (G) Footnotes

* * * * *

G27 - In the bands 225-328.6, 335.4-399.9, and 1350-1400 MHz, the fixed and mobile services are limited to the military services.

* * *

G30 - In the bands 138-144, 148-149.9, 150.05-150.8, 1427-1429, and 1429-1435 MHz, the fixed and mobile services are limited primarily to operations by the military services.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-371

In re Applications of

BREAUX BRIDGE BROADCASTERS LIMITED PARTNERSHIP — File No. BPH-851115MY

J.B.C., INC. — File No. BPH-851115NL

For Construction Permit for a New
FM Station on Channel 243A
Breaux Bridge, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 1989; Released: July 10, 1989

By the Review Board: MARINO (Chairman) and BLUMENTHAL; Board Member BLUMENTHAL issuing a Separate Statement.

1. On June 13, 1989, a Joint Request for Approval of Settlement Agreement was filed by the two remaining applicants, J.B.C., Inc. (JBC), and Breaux Bridge Broadcasters Limited Partnership. We will grant the joint request which contains the showing required by Section 73.3525 of the Commission's rules, 47 CFR 73.3525.

2. An oral argument was scheduled for June 9, 1989, on exceptions to the *Initial Decision* of Administrative Law Judge Kuhlmann, 4 FCC Rcd 581, released January 13, 1989, but was postponed after the applicants indicated that a settlement was probable. JBC had been found to be the superior comparative applicant in the *Initial Decision*, provided that one of JBC's principals "William D. Jackson divests his interests in stations WBAD and WESY, Leland, Mississippi prior to beginning operation with program test authority." *Id.* at 585.

3. In the settlement agreement, Breaux Bridge has agreed to dismiss its application and in return will receive $15,000.00 from JBC and a limited right of first refusal to purchase the station. As required by the Commission's rules, both applicants have submitted declarations under penalty of perjury stating that their applications were not filed for purposes of reaching or carrying out a settlement. They have also shown that the public interest would be served by conserving the litigation resources of the Commission and the parties and "by hastening the establishment of the first FM and the first local full-time radio service in Breaux Bridge." Joint Request at 2. The Joint Request satisfies the requirements of the Commission's rules, 47 CFR 73.3525, which implements the requirements of the Communications Act, 47 U.S.C. 311(c)(3).

4. A separate "Petition for Leave to Amend" was filed by JBC alone on June 13, 1989. Favorable action on this petition is not a condition to the dismissal of Breaux Bridge's application, or to JBC's obligation to pay the specified consideration for the dismissal of that application. Joint Request at n. 1. JBC did assert in its petition (at 1-2) that "a major factor leading JBC to enter into the Settlement Agreement was the fact that settlement of this proceeding by private agreement would, under established Commission policy, permit JBC to request and obtain deletion of the divestiture condition that was included in the *Initial Decision* granting JBC's application . . . ." *See* para. 2, above. In support of its petition, JBC cites the Board's recent decision in *WCVQ, Inc.*, 4 FCC Rcd 4079 (Rev. Bd. 1989) (Application For Review pending). The policy reversal recently noticed by the Board in that case, *id.*, at 4079 (citing *Ruarch Associates*, FCC 86-130, released March 28, 1986) (unpublished)), supports JBC's petition to delete the divestiture condition. We will therefore grant its petition and delete that condition from the *Initial Decision*.

5. ACCORDINGLY, IT IS ORDERED, That the Joint Request for Approval of Settlement Agreement filed June 13, 1989, IS GRANTED, and the Settlement Agreement IS APPROVED; that the application of Breaux Bridge Broadcasters Limited Partnership IS DISMISSED; that the application of J.B.C., Inc. (File No. BPH-851115NL) IS GRANTED; and

6. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by J.B.C., Inc., on June 13, 1989, IS GRANTED, and that the following language: "provided William D. Jackson divests his interests in stations WBAD and WESY, Leland, Mississippi prior to beginning operation with program test authority" IS DELETED from the last ordering clause of the Initial Decision in this case; and

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

SEPARATE STATEMENT
OF
BOARD MEMBER NORMAN B. BLUMENTHAL

In *WCVQ, Inc., ante*, the Board very respectfully suggested that the full Commission review the new *Ruarch* policy with an eye towards harmonization with its even more recent concern for disingenuous application proposals. *Report and Order In the Matter of Revision of Application for Construction Permit for Commercial Broadcast Station* (FCC Form 301), FCC 89-110, released April 20, 1989. The Federal Communications Bar Association has recently seconded that specific suggestion. *See* Comments Of The Federal Communications Bar Association, (MM Docket No. 89-15), filed May 31, 1989, at 39 n. 58 ("The FCBA raises the issue whether settlement of a comparative case should extinguish an applicant's obligation to

comply with the commitments it makes during the hearing proceeding."). *See also* THE LINE MONITOR, Vol. 89 No. 0523 (Reunion Press, Inc.) at 4 *("Editor's Aside:* Upholding [the new *Ruarch* and *Mark L. Wodlinger* policies] would gut integration proposals and divestiture commitments of any remaining meaning. We also must sympathize with those permittees who steadfastly honored their commitments after gaining the permit through settlement unaware of 'unpublished' decisions 'breaking' their promises for them!"). The instant settlement agreement, in which one applicant magnanimously relieves the other *(thank you very much; awfully sporting old chap)* of an express pledge made *to the Commission,* triggers a renewal of the Board's suggestion.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-302

In re Applications of

LARRY W. GAMBLE	File No. BPH-870825MA
Miguel V. Gutierrez d/b/a MADERA FM RADIO	File No. BPH-870827NL
MADERA FM LIMITED PARTNERSHIP	File No. BPH-870827NM
CYNTHIA K. BYINGTON	File No. BPH-870827NS

For Construction Permit for a
New FM Station, Channel 297A,
Madera, California

ORDER

Adopted: June 23, 1989; Released: July 10, 1989

By the Review Board: MARINO (Chairman) and BLUMENTHAL.

1. On June 6, 1989, Robert P. Duff filed with the Review Board a "Petition to Set Aside" grant of the application of Madera FM, Inc. (formerly Madera FM Limited Partnership) for a construction permit for a new FM station (Channel 297A) at Madera, California. *See Memorandum Opinion and Order*, FCC 89M-1337, released May 4, 1989 (approving settlement agreement and granting Madera FM application). It is represented that a copy of Duff's petition was served on counsel for Madera FM, Thomas L. Root. Madera FM has not responded to the Duff petition. In his petition, Duff alleges that he telephoned the owner of Madera FM's proposed transmitter site, Aram Arakeliam, who stated that he had not spoken with anyone connected with Madera FM about the site and had not given permission for his land to be used as Madera FM's transmitter site. We shall dismiss Duff's petition which fails to comply with several basic requirements of the Commission's rules which implement specific pleading requirements set out in the Communications Act, 47 U.S.C. 309(d)(1).

2. Duff's petition is facially defective in at least two important respects. First, Duff has not shown, or even alleged, that he is a party to this proceeding, and therefore lacks standing to file either an appeal of a final ruling as a matter of right, *see* 47 CFR §1.302(a), or a motion to enlarge issues, *see* 47 CFR §1.229(a). *See William L. Zawila*, 3 FCC Rcd 6214 (Rev. Bd. 1988); 47 USC 309(d)(1)("A party in interest may file with the Commission a petition . . . "). Second, and more important, Duff's allegations are unsupported by a personal knowledge affidavit of Mr. Arakeliam, and therefore the petition is wholly inadequate to support either Duff's implicit attempt at intervention in this proceeding, *see* 47 CFR §1.223(c), or enlargement of the issues against Madera FM. *See* 47 CFR §1.229(d). *See Catherine Juanita Henry*, 3 FCC Rcd 7177, 7178 (Rev. Bd. 1988) and 3 FCC Rcd 6806, 6807 n.1 (Rev. Bd. 1988). *Cf.* 47 USC 309(d)(1)("The petition shall contain specific allegations of fact . . . supported by affidavit of a person or persons with personal knowledge thereof . . . "). Finally, Duff has not shown that he relies on "newly discovered evidence" -- namely that "the facts relied on must show the petitioner could not with due diligence have known or discovered the facts at the time of the hearing" -- and therefore his petition fails the Commission's strict test for a post-decisional reopening of the record. *Southeast Arkansas Radio, Inc.*, 61 FCC 2d 72, 74 (1976).[1]

3. ACCORDINGLY, IT IS ORDERED, That the Petition to Set Aside filed on June 6, 1989 by Robert P. Duff IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTE

[1] Under Section 1.68 of the Commission's Rules, 47 CFR §1.68:

> (a) An application for license by the lawful holder of a construction permit will be granted without hearing where the Commission, upon examination of such application, finds that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest.
>
> (b) In the event the Commission is unable to make the findings in paragraph (a) of this section, the Commission will designate the application for hearing upon specified issues.

Should Madera seek to amend its application to a new transmitter site prior to construction, the Commission's Mass Media Bureau may wish to pursue the instant allegations to ensure that Madera's original certification of "reasonable assurance" of its site was *bona fide*. *Cf. Shirley Marchant*, FCC 89R-41, adopted June 16, 1989 (Bureau seeks reopening of record and evidentiary hearing based on post-hearing allegations of false site certification; proceeding remanded). *See also* 47 U.S.C. §312(a)(2)(FCC may revoke permit "because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application").

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DUANE DELOREY FOIA Control No. 89-13

On Request For Inspection of
Records

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1989; Released: July 7, 1989

By the Commission:

1. The Commission has before it an application for review filed by Mr. Duane Delorey, seeking review of a ruling by the Chief, Field Operations Bureau (FOB), which denied Mr. Delorey's Freedom of Information Act (FOIA) request, 5 U.S.C. § 552(b). Mr. Delorey sought disclosure of the identity of a complainant against his radio operations.

2. In October 1988, the Detroit Office of FOB investigated a complaint that transmissions from Mr. Delorey's amateur radio station caused interference to electronic entertainment equipment. Mr. Delorey requested disclosure of the identity of the complainant following completion of the investigation and his compliance with FOB's instructions to eliminate the interference. FOB denied Mr. Delorey's request since the complaint had been submitted confidentially.

3. On appeal, Mr. Delorey states that he cooperated fully with FOB's investigation and that the investigation disclosed no violation of law or of the Commission's rules. Further, Mr. Delorey states that he is the victim of harassment, including profane telephone calls, which he believes are from the anonymous complainant. Mr. Delorey argues that, since the investigation is complete and disclosure of the complainant's identity would help bring the harassment to an end, the Commission has no valid reason for continued provision of confidentiality.

4. Congress established the FOIA to provide an effective statutory right to persons seeking disclosure of government records. Such records must be made available for public inspection unless a document falls within one of nine statutory exemptions to mandatory disclosure. Exemption 7(D) protects from mandatory disclosure "records or information compiled for law enforcement purposes [which] could reasonably be expected to disclose the identity of a confidential source . . . which furnished information on a confidential basis." 5 U.S.C. § 552(b)(7)(D), as amended by Pub. L. No. 99-570, section 1802 (1986). The identity of a confidential source may be protected whenever a Federal agency receives from a person information related to its law enforcement responsibility and the agency has made that person an express or implied promise of confidentiality. *See King v. Department of Justice*, 830 F.2d 210, 235 (D.C. Cir. 1987). The term "source" includes persons providing unsolicited allegations of misconduct. *See Brant Constr. Co. v. EPA*, 778 F.2d 1258, 1263 (7th Cir. 1985).

5. As noted in this case the complainant expressly asked that his identity be kept confidential. In declining to reveal the identity of its source, FOB concluded that considerable harm would be done to our investigatory efforts and ability to obtain information by disclosure of the identity of a confidential complainant. We agree with that assessment. A major purpose of Exemption 7(D) is to encourage private citizens to furnish information to the government. Exemption 7(D) ensures that "confidential sources are not lost because of retaliation against the sources for past disclosure or because of the sources' fear of future disclosure." *Brant Constr. Co. v. EPA*, 778 F.2d at 1262. For this reason, the provision of confidentiality afforded by Exemption 7(D) does not terminate at the conclusion of a law enforcement proceeding. *See Aspin v. Department of Defense*, 491 F.2d 24, 29-30 (D.C. Cir. 1973). Otherwise, few individuals would come forth with information necessary for us to assure adherence to our regulations.

6. In view of the foregoing, we conclude that FOB has acted properly, and we will not disturb its ruling below.

7. Accordingly, IT IS ORDERED, That the application for review filed by Duane Delorey IS DENIED.

8. The requester may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

The officials responsible for this action are the following Commissioners: Dennis R. Patrick, Chairman, James H. Quello, and Patricia Diaz Dennis.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ALDEN COMMUNICATIONS CORP.
Green Valley, Arizona

MM DOCKET NO. 83-720
File No. BPCT 830311KF

SUNGILT CORPORATION, INC.
Green Valley, Arizona

MM DOCKET NO. 83-721
File No. BPCT 830311KN

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 1989; Released: July 10, 1989

By the Commission:

1. Before the Commission are (1) an Application for Review filed Dec. 16, 1988 by Alden Communications Corp., (2) an Opposition to Application for Review filed Jan 3, 1989 by Sungilt Corporation, Inc., and (3) a Contingent Application for Review filed Sept. 21, 1988 by Sungilt Corporation, Inc. These pleadings relate to the Supplemental Decision of the Review Board, 3 FCC Rcd 5047, *recon. denied*, 3 FCC Rcd 6601 (1988), granting the application of Sungilt Corporation, Inc.

2. IT IS ORDERED that, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed by Alden Communications Corp. IS DENIED, and the Contingent Application for Review filed by Sungilt Corporation, Inc., IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

HAMPSHIRE COUNTY BROADCASTING COMPANY, INC. Amherst, Massachusetts	**BC DOCKET NO. 81-159** File No. BPH-9176
AMHERST BROADCASTING, INC. Amherst, Massachusetts	**BC DOCKET NO. 81-160** File No. BPH-9566

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 1989; Released: July 10, 1989

By the Commission:

1. This proceeding involves mutually exclusive applications for a new Class A FM station at Amherst, Massachusetts filed by Hampshire County Broadcasting Co., Inc. and Amherst Broadcasting, Inc. On April 11, 1984, Chief Administrative Law Judge Thomas B. Fitzpatrick released an initial decision granting Hampshire's application and denying Amherst Broadcasting's application. 99 FCC 2d 608 (Admin. L.J. 1984). The Review Board affirmed the ALJ. 99 FCC 2d 600 (Rev. Bd. 1984), recon. denied, 100 FCC 2d 245 (Rev. Bd. 1985). The Commission affirmed the Review Board without comment. FCC 86-100 (Mar. 30, 1986), recon. denied, 2 FCC Rcd 198 (1987).

2. Amherst Broadcasting appealed the grant of Hampshire's application to the United States Court of Appeals for the District of Columbia Circuit. *Amherst Broadcasting, Inc. v. FCC*, No. 87-1066 (D.C. Cir. filed Feb. 9, 1987). In the course of filing its brief, the Commission's staff discovered that in November 1985 Hampshire had acquired an AM station in Brockton, Massachusetts. Because the Commission was unaware of this acquisition when it affirmed the Board's decision, and because the potential impact of that acquisition on Hampshire's substantial diversification preference had not been evaluated, the court remanded the proceeding at the Commission's request. No. 87-1066 (Nov. 19, 1987).

3. After soliciting and reviewing comments and related pleadings from the parties, the Commission reaffirmed its denial of Amherst Broadcasting's application for review of the Review Board's decision and its subsequent denial of Amherst Broadcasting's petition for reconsideration thereof. 3 FCC Rcd 6137 (1988). Now before the Commission is a Petition for Reconsideration, filed November 21, 1988 by Amherst Broadcasting, an opposition filed November 28, 1988 by Hampshire, and a reply and a petition to accept a late filed pleading filed December 21, 1988 by Amherst Broadcasting.[1]

4. In its Petition for Reconsideration, Amherst Broadcasting once again argues that Hampshire should be disqualified because of its violation of the reporting requirements of 47 C.F.R. § 1.65, that Hampshire's interest in the permittee of an Easthampton, Massachusetts station should be attributed to Hampshire, and that the Commission failed to decide the diversification issue in this proceeding on the basis of all relevant facts. In its Opposition, Hampshire contends that Amherst Broadcasting's Petition raises no new or newly discovered matters and that the Petition should, therefore, be dismissed as a repetitious pleading pursuant to 47 C.F.R. § 1.106(b)(2).[2]

5. Amherst Broadcasting submits that the Commission erred in several respects in its order on remand. Nonetheless, Amherst Broadcasting's pleading presents no new or newly discovered facts or circumstances. Amherst Broadcasting's contentions were fully considered in the Commission's October 1988 order. Its current pleading merely reiterates its disagreement with the determinations reached there, without providing any proper basis for granting reconsideration. *See WWIZ, Inc.*, 37 FCC 685 (1964), aff'd sub nom. *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966). Therefore, the public interest will be best served by dismissal of Amherst Broadcasting's Petition for Reconsideration without further consideration.

6. ACCORDINGLY, IT IS ORDERED, That the Petition to Accept late filed reply filed December 21, 1988 by Amherst Broadcasting, Inc. IS GRANTED, the late filed reply IS ACCEPTED, and the Petition for Reconsideration, filed November 21, 1988 by Amherst Broadcasting, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Good cause having been shown, Amherst Broadcasting's request to accept its late filed reply will be granted.

[2] In its Reply, Amherst Broadcasting contends that the acceptability of its Petition for Reconsideration was recognized in the Status Report submitted to the Court of Appeals on November 15, 1988, which stated that the "deadline for seeking reconsideration" of the Commission's October 1988 order was November 21, 1988. To the extent that Amherst Broadcasting suggests that the Status Report demonstrates its right to file the instant Petition for Reconsideration, it is mistaken. The Status Report merely stated the deadline for the filing of an appropriate petition for reconsideration. That document in no way suggested that a pleading, deficient under Section 1.106 of the Rules, would be entitled to consideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-418

In the Matter of

Amendment of Section 73.202(b), RM-6402
Table of Allotments,
FM Broadcast Stations.
(Hawley, Pennsylvania)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 21, 1989; Released: July 10, 1989

By the Chief, Allocations Branch:

1. At the request of Jerry C. Paparelli (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 5247 (1988), proposing the allotment of Channel 287A to Hawley, Pennsylvania, as the community's first local FM service. The petitioner and Ondra Nichols ("Nichols") filed comments supporting the allotment and stating an intention to apply for the channel, if allotted.

2. We believe the public interest would be served by allotting Channel 287A to Hawley, Pennsylvania, since an interest has been expressed in providing the community with its first local FM service. Channel 287A can be allotted to Hawley in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.0 kilometers (2.5 miles) north to avoid a short-spacing to the pending application of Station WDAS-FM, Channel 287B1, Philadelphia, Pennsylvania.[1] Canadian concurrence has been received since Hawley is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 24, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Hawley, Pennsylvania	287A

4. The window period for filing applications will open on **August 25, 1989,** and close on **September 25, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-30-32 and West Longitude 75-10-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-306

In the Matter of

Amendment of Section 73.202(b), RM-6671
Table of Allotments,
FM Broadcast Stations.
(Elko, Nevada)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 21, 1989; Released: July 10, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Holiday Broadcasting Company of Elko (petitioner), requesting the substitution of Channel 237C for Channel 237A at Elko, Nevada, and the modification of its license for Station KRJC to specify operation on the higher powered channel.[1] Petitioner states that it will apply for the channel, if allotted. Channel 237C can be allotted to Elko in compliance with the Commission's minimum distance separation requirements and can be used at the present transmitter site of Station KRJC.[2]

2. We believe the public interest would be served by proposing the substitution of Channel 237C for Channel 237A at Elko, Nevada, since it could enable Station KRJC to expand its coverage area. As requested, we shall also propose to modify petitioner's license for Station KRJC to specify operation on Channel 237C. In accordance with Section 1.420(g) of the Commission's Rules, competing expressions of interest in use of the channel at Elko will not be accepted and petitioner will not be required to demonstrate the availability of an additional equivalent for use by such parties. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Elko, Nevada	228A, 237A	229C2,[3] 237C

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **August 31, 1989,** and reply comments on or before **September 15, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Alan D. Hague
Executive Vice President
Holiday Broadcasting Company of Elko
c/o Carlson Communications International
P.O. Box 7040
Salt Lake City, Utah 84107
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner requests consolidation with the pending request of Elko Broadcasting, Inc. to substitute Channel 229C2 for Channel 228A at Elko, and the modification of its license for Station KLKO accordingly. *See* MM Docket No. 88-545, 3 FCC Rcd 7066 (1988). However, we decline to do so since there is no conflict between the two allotments.

[2] The coordinates for this allotment are North Latitude 40-54-35 and West Longitude 115-49-05.

[3] The Commission has proposed to substitute Channel 229C2 for Channel 228A in MM Docket 88-545, 3 FCC Rcd 7066A(1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-545

In the Matter of

Amendment of Section 73.202(b),	RM-6458
Table of Allotments,	
FM Broadcast Stations.	
(Elko, Nevada)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 21, 1989; Released: July 10, 1989

By the Chief, Allocations Branch:

1. At the request of Elko Broadcasting, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 7066 (1988), proposing the substitution of Channel 229C2 for Channel 228A at Elko, Nevada, and the modification of its license for Station KLKO to specify the higher powered channel. Petitioner and Holiday Broadcasting Company of Elko ("Holiday"), licensee of Station KRJC(FM), Elko, Nevada, filed comments.

2. Petitioner reiterates its intention to apply for Channel 229C2, if allotted. Holiday also supports adoption of petitioner's proposal. In addition, it submitted a petition for rule making seeking the substitution of Channel 237C for Channel 237A at Elko and the modification of its license for Station KRJC(FM) accordingly. Holiday requests that its petition be given consolidated consideration herein.

3. We will not consolidate Holiday's request for the allotment of Channel 237C to Elko with this proceeding. There is no conflict between the two proposals and therefore Holiday's request cannot be considered as a counterproposal. However, its petition (RM-6671) will be the subject of a separate Notice of Proposed Rule Making.

4. We believe the public interest would be served by allotting Channel 229C2 to Elko, Nevada, since it could enable Station KLKO to expand its coverage area. Channel 229C2 can be allotted to Elko in compliance with the Commission's minimum distance separation requirements and can be used at the station's present transmitter site.[1] As proposed, we will also modify petitioner's license for Station KLKO to specify operation on Channel 229C2.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 24, 1989**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Elko, Nevada	229C2, 237A

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Elko Broadcasting, Inc., for Station KLKO, Elko, Nevada, IS MODIFIED to specify operation on Channel 2292C2, in lieu of Channel 228A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-50-37 and West Longitude 115-44-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-30

In the Matter of

Amendment of Section 73.202(b), RM-6115
Table of Allotments,
FM Broadcast Stations.
(Pueblo, Colorado)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 21, 1989; Released: July 10, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 3 FCC Rcd 658 (1988), proposing the substitution of Channel 296C2 for Channel 296A at Pueblo, Colorado, and modification of the license of Rainbow Communications of Pueblo, Inc. ("Rainbow") for Station KCSJ-FM, Channel 296A, to specify operation on the higher class channel.[1] Petitioner filed supporting comments.[2]

2. As indicated in the *Notice*, Channel 296C2 can be allotted to Pueblo consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 6.6 kilometers (4.1 miles) northwest of the community[3] to avoid short-spacing to vacant Channel 295A, La Junta, CO.[4]

3. In consideration of the above, we believe the public interest would be served by substituting Channel 296C2 for Channel 296A at Pueblo, Colorado, since it could provide an additional wide coverage area FM service to the community. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Station KCSJ-FM to specify operation on Channel 296C2 in lieu of Channel 296A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 24, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Pueblo, Colorado	245C, 255C, 260C, 264C, 283C1, 296C2, 300C1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Rainbow Communications of Pueblo, Inc. for Station KCSJ-FM, IS MODIFIED effective **August 24, 1989,** to specify operation on Channel 296C2 in lieu of Channel 296A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] At the time this proposal was filed, Sunbrook Broadcasting, Inc. was the licensee of Station KCSJ-FM, formerly Station KUSN(FM). An assignment of the license to Rainbow Communications, Inc. (BALH-870928EC) was granted November 17, 1987, and consummated December 3, 1987.

[2] In addition, after the record closed, Rainbow filed additional comments related to a separate proceeding, MM Docket No. 88-46, involving, among other things, a request by Dr. Ronald A. Johnson to allot FM Channel 241C2 to Pueblo, CO. However, Rainbow subsequently requested withdrawal of those comments as well as expedited action in this proceeding. In light of our recent action in MM Docket No. 88-46, in which Dr. Johnson's proposal was dismissed, Rainbow's withdrawal request is moot.

[3] Coordinates at the restricted site are 38-16-22 and 104-40-48.

[4] Coordinates for Channel 295A at La Junta, CO are 37-58-42 and 103-32-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-307

In the Matter of

Amendment of Section 73.606(b), RM-6301
Table of Allotments,
TV Broadcast Stations.
(Modesto and Ceres, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 21, 1989; Released: July 10, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein the petition for rule making filed on behalf of Bet Nahrain, Inc. (petitioner), seeking the reallotment of UHF television Channel *23 (vacant and unapplied for) from Modesto to Ceres, California, as that community's first local television service. Petitioner states that should this proposal be adopted, it will apply for the channel.

2. Ceres (population 13,281),[1] in Stanislaus County (population 265,900), is located approximately 130 kilometers (80 miles) southeast of San Francisco. It currently has no local television broadcast service.

3. A staff engineering analysis has determined that Channel *23 can be reallocated from Modesto to Ceres, California, in conformity with the minimum distance separation requirements of Sections 73.610 and 73.698 of the Commission's Rules.[2] However, Channel *23 is 59 miles short-spaced to the proposed use of Channel 24 for land mobile use in San Francisco,[3] in General Docket 85-172. Therefore, depending on the decision ultimately reached in that proceeding, if Channel *23 is reallocated to Ceres, the quality of its reception may be affected by the proposed land mobile service in San Francisco.

4. Moreover, it should be noted that the Commission has recently imposed a freeze on television allotments, or applications therefor, near certain metropolitan areas, including San Francisco and Sacramento-Stockton, pending the outcome of an inquiry into the spectrum needs of advanced television systems (ATV) in broadcasting. *See Notice of Inquiry*, 2 FCC Rcd 5125 (1987), and *Order*, 52 FR 28346 (1987). While it imposed the freeze, the Commission also indicated that it will consider waiver requests on a case-by-case basis for noncommercial educational channels, or for petitions or applications which provide compelling reasons why this freeze should not apply to their particular situation. *See, Order, supra*. While the proposed reallotment of Channel *23 to Ceres falls within the "freeze" parameters to the San Francisco and Sacramento-Stockton markets, it is further removed from those cities than the current allotment of Channel 23 at Modesto. Relying on this fact and based on the allotment being reserved for noncommercial educational use, petitioner requests waiver of the freeze. We conclude that waiver of the freeze on allotment changes appears to be warranted under these circumstances. However, we take no position at this time on whether a waiver of the freeze on applications for the allotments is appropriate. If the freeze is still in effect, that matter will need to be addressed in a waiver request and justification at the time such an application is filed.

5. In view of the above, we believe the public interest would benefit from this proposal since it could provide a first local television broadcast service to Ceres for noncommercial educational programming. Therefore, we shall seek comments on the proposal to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Ceres, California	--	*23+
Modesto, California	19-, *23+	19-

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **August 31, 1989,** and reply comments on or before **September 15, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Bet Nahrain, Inc.
Attn: Dr. Sargon Dadesho
P.O. Box 4116
Modesto, CA 95352

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission

specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures are from the 1980 U.S. Census.

[2] This determination is based on the use of city reference coordinates at 37-35-24 and 120-57-06.

[3] *See, Further Sharing of the UHF Television Band by Private Land Mobile Services*, 50 FR 25587 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-308

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Neenah-Menasha and Rhinelander, Wisconsin) RM-6691

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: June 21, 1989; Released: July 10, 1989

By the Chief, Allocations Branch:

1. Evangel Ministries, Inc. (petitioner), licensee of Station WEMI(FM), Channel 261A at Neenah-Menasha, Wisconsin, filed a petition for rule making seeking the substitution of Channel 262C2 for Channel 261A at Neenah-Menasha, and modification of the license of Station WEMI(FM) to specify operation on the higher powered frequency. Petitioner also seeks the modification of the license for Station WRHN(FM), Channel 262C1, Rhinelander, Wisconsin, to specify operation on Channel 261C1 in lieu of Channel 262C1, in order to accomplish the upgrade at Neenah-Menasha.[1]

2. We believe the proposal warrants consideration. Our engineering analysis indicates Channel 262C2 can be substituted for Channel 261A at Neenah-Menasha in compliance with the Commission's minimum distance separation requirements at the current transmitter site of Station WEMI(FM), if the channel substitution is made at Rhinelander.[2] Channel 261C1 can be substituted for Channel 262C1 at Rhinelander at the current transmitter site of Station WRHN(FM).[3] Therefore, we are herein issuing a *Show Cause Order* to Oneida Broadcasting Company, the licensee of Station WRHN(FM) at Rhinelander seeking comments as to why its license should not be modified to specify operation on Channel 261C1 in lieu of Channel 262C1.

3. Since Rhinelander is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government must be obtained for the proposal.

4. Commission policy requires that the petitioner reimburse Station WRHN(FM) for the reasonable costs of changing its frequency. Petitioner states its willingness to reimburse Station WRHN(FM).

5. As requested, we shall propose to modify the permit of Station WEMI(FM), Channel 261A at Neenah-Menasha to specify operation on Channel 262C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Neenah-Menasha.

6. In view of the fact that Neenah-Menasha, could receive its first wide coverage area FM service the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Neenah-Menasha, Wisconsin	232A, 261A	232A, 262C2
Rhinelander, Wisconsin	248C1, 262C1	248C1, 261C1

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Oneida Broadcasting Company, licensee of Station WRHN(FM), Channel 262C1, Rhinelander, Wishconsin, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 261C1 in lieu of Channel 262C1.

8. Pursuant to Section 1.87 of the Commission's Rules, Oneida Broadcasting Company, not later than **August 31, 1989,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Oneida Broadcasting Company, to furnish additional information. If Oneida Broadcasting Company, raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Oneida Broadcasting Company, will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Oneida Broadcasting Company
P. O. Box 738
Rhinelander, WI 54504

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **August 31, 1989,** and reply comments on or before **September 15, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Dennis P. Corbett, Esquire
Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D. C. 20006-1809
(Counsel for petitioner)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner failed to indicate compliance with Section 1.401(d) of the Commission's Rules which requires service of its proposal on the Rhinelander station. Petitioner should indicate in comments whether, in fact, it did comply with this requirement, and if not, why its proposal should be further considered in this proceeding.

[2] The coordinates for Station WEMI(FM) are 44-15-17 and 88-26-13.

[3] We note that there is pending an application for Station WRHN(FM) to relocate its current transmitter site which conflicts with this proposal. The application (BPH-890131IB) is being held in abeyance pending the outcome of this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-305

In the Matter of

THE GTE TELEPHONE OPERATING COMPANIES
Revisions to Tariff F.C.C. No. 1

Transmittal Nos. 506, 513, 517, 521, and 522

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 1989; Released: June 28, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On May 18, 1989, the GTE Telephone Operating Companies (GTOC) filed Transmittal No. 506 which proposes to offer DS3 service under a general tariff offering. GTOC states that this filing contains rates for GTE Florida, Inc., and that rates for other GTOC service territories will be filed at a later date.[1] Transmittal No. 506 also contains general tariff rates for DS3 to DS1 Multiplexing Arrangements. Under Transmittal No. 513, GTOC proposes rates for DS3 service and for DS3 to DS1 Multiplexing Arrangements for the states of Idaho, Indiana, Kentucky, North Carolina, Oregon, and Washington.[2] On June 9, 1989, GTOC filed Transmittal No. 517, which proposes clarifications and additions to the rate structure filed under the previous two transmittals.[3] Finally, GTOC has filed proposed tariff revisions to offer DS3 service in California, Georgia, Hawaii, Illinois, Missouri, Pennsylvania, South Carolina, Texas, and Wisconsin under Transmittal No. 521.[4]

2. Currently, all DS3 services offered by GTOC are provided on an individual case basis (ICB). By these transmittals, GTOC would offer DS3 service under a general tariff offering, with new rates and rate structures, only to new DS3 customers. GTOC's proposed DS3 rate structure includes two rate elements. The first rate element, DS3 Special Access Lines (SALs), provides the facilities between a customer's designated location (CDL) and the GTOC serving wire center for that location. GTOC proposes to offer two types of DS3 SALs: IC SALs, which terminate at an interexchange carrier's (IC) point of presence (POP) and End User SALs, which will terminate at all other locations. GTOC states that these classifications only identify where the facilities terminate and not the type of customer that may order them. GTOC proposes to offer the two types of SALs at different rates and under different rate structures.[5]

3. The second DS3 rate element, Special Transport, has two components. The first component is a charge assessed for each termination of a DS3 Special Transport facility; the second is an additional charge assessed based on the airline mileage between terminating locations. GTOC states that this structure is consistent with its current DS1 Special Transport rate structure. GTOC Tr. No. 506, Description and Justification (D&J) at 2. Finally, rates for DS3 service vary depending upon which of four minimum service periods the customer selects. *Id.*

II. PLEADINGS

4. MCI Telecommunications Corporation (MCI) and Intermedia Communciations of Florida, Inc. (Intermedia) have filed petitions to reject or suspend and investigate Transmittal No. 506.[6] MCI has also filed a petition to reject or suspend and investigate Transmittal No. 513 and a third petition which seeks suspension and investigation of Transmittal Nos. 517, 521, and 522. MCI argues that the disparate rate structures for DS3 service connected to an IC's POP and an end user's CDL may be unreasonably discriminatory. MCI Tr. No. 506 Petition at 3-4. MCI also argues that GTOC's proposal to "grandfather" existing DS3 services should be added to the pending investigation of local exchange carrier (LEC) DS3 rates in CC Docket No. 88-136.[7] Finally, MCI argues that the pending tariff revisions should be investigated because GTOC has not justified the rate increase over existing ICB DS3 rates. *Id.* at 4-5.[8]

5. Intermedia states that it concurs in MCI's analysis. Intermedia argues that because GTOC has failed to provide cost data that justify any rate disparities, the proposed rates for IC SALs and End User SALs are unreasoanbly discriminatory in contravention of Section 202(a) of the Communcations Act, 47 U.S.C. § 202(a), and should be rejected. Intermedia argues that, despite the fact that the facilities used to provide the two different types of SALs are identical, the rate for the first quarter-mile of an End User SAL is more than three times the rate for a comparable IC SAL.[9] Moreover, Intermedia contends, the additional charge for service to locations where DS3 capacity does not already exist may unreasonably discriminate against customers on the basis of their geographic location.[10] Intermedia argues that GTOC's proposed charge based on the availability of facilities is particularly unreasonable if, as it contends is generally true, GTOC's fiber optic facilities are concentrated in metropolitan areas where demand for DS3 service, and, hence, competition for the provision of access services, is the greatest. *Id.* at 5-6.[11] In addition, Intermedia asserts that the rates GTOC has proposed for additional End User SALs are unreasonable and that GTOC has failed to justify these rates on the basis of its costs. *Id.* at 6-8. Finally, Intermedia argues that the proposed tariff contains unreasonable use restrictions. *Id.* at 8.[12]

6. In its reply to MCI's petition, GTOC argues that its proposed rates are cost-based and that MCI's petition therefore should be denied. GTOC claims that it filed extensive cost support material for each rate element which demonstrates that the differences in the proposed DS3 rates are reasonable. According to GTOC, the cost of providing IC SALs and End User SALs differs because of economies of scale in the fiber optic network used to provide service to the IC's location. GTOC states that, because of existing switched and special access traffic levels, there is an extensive fiber optic network in place between the IC's POP and GTOC's serving wire center. Such systems are typically capable of supporting 12 DS3s, GTOC states. In contrast, GTOC contends, plant used to provide end user access is predominantly copper wire and

any fiber optic systems currently in place are capable of supporting only three DS3s. GTOC Reply to MCI Petition at 3-4.

7. In a subsequent pleading responding to Intermedia's late-filed petition, GTOC adds that the proposed rates for facilities not already existing are reasonable and nondiscriminatory. GTOC notes that this provision is intended to recover the cost of facilities which it otherwise may not have constructed. GTOC Reply to Intermedia Petition at 3-4. Finally, GTOC states that its tariff does not limit the number of End User SALs that a customer may purchase. GTOC states that unlimited numbers of three DS3 capacity systems may be ordered and notes further that Transmittal No. 517 adds a 12 DS3 capacity system. *Id.* at 4-5.

8. Furthermore, GTOC argues, the proposed lower rates for additional End User DS3 SALs are cost-based. According to GTOC, the rate for the first one-quarter mile End User SAL covers the cost of that portion of the fiber cable and of all fiber optic terminal equipment required for a three-DS3 system. In contrast, GTOC states, because fiber cable and terminal equipment are generally available on an average 12-DS3 system in the interexchange portion of the network, each IC DS3 SAL need only cover an identical pro rata share of the associated costs. *Id.* at 4-5.

9. GTOC also argues that the continuation of ICB rates for existing customers is justified for several reasons. First, GTOC states, rigorous costing methods were used to develop these ICB rates. In addition, GTOC contends, these rates represent a bargain that presumably is still satisfactory to both parties. GTOC also expresses concern that conversion of ICB customers to general tariff rates could cause financial harm to particular customers or to GTOC. Finally, GTOC asserts that technology changes have significantly altered the costs of provisioning DS3 service since ICB rates were instituted. As a result, GTOC concludes, conversion to tariffed rates would not necessarily reflect relevant costs. *Id.* at 6-8.

III. DISCUSSION

10. As we have noted, this Bureau is currently investigating various LEC DS3 tariffs in Docket 88-136. That investigation began as an investigation of the carriers' ICB rates for DS3 service. In the *Annual 1989 Access Order* we also made the Bell Operating Companies' (BOCs) general DS3 tariffs subject to that investigation. The Bureau has since designated issues for investigation of those tariff filings.[13] Those issues generally address the continued use of ICB pricing by the BOCs in their general tariffs for DS3 service. We believe that GTOC's proposed general DS3 tariff raises similar questions of lawfulness and must therefore be suspended and investigated.

11. We will not include GTOC's tariff in the ongoing investigation in Docket 88-136, however. To do so would require the establishment of an additional pleading cycle which would necessarily delay the resolution of the issues that have already been designated in that docket. In addition, GTOC's filing raises unique issues that we believe can best be addressed in a separate investigation. We therefore suspend the captioned tariff revisions for one day to allow the imposition of an accounting order and institute an investigation of these revisions. GTOC is also granted special permission to advance the effective dates of Transmittal Nos. 517, 521, and 522 to July 3, 1989. We designate the following issues for investigation:

(1) Is the continued use of ICB pricing for DS3 customers who commenced service prior to July 3, 1989, unreasonably discriminatory? Are similarly situated customers paying different prices for the same or comparable service? GTOC should provide information concerning the number of individual case basis DS3 services it currently provides to ICs and to end users in each jurisdiction in which it provides service and for all its operating companies.

(2) Is the provision of DS3 Special Access Lines that terminate at Interexchange Carrier Points of Presence at different rates and under a different rate structure than are applied to DS3 Special Access Lines that terminate at End User Customer Designated Locations an unjust or unreasonable discrimination or an undue preference in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a)?

(3) Is the provision of additional End User DS3 Special Access Lines at distance insensitive rates an unjust or unreasonable discrimination or an undue preference in violation of Section 202(a) of the Communications Act

(a) as compared to rates for Interexchange Carrier DS3 Special Access Lines?

(b) as compared to rates for initial End User DS3 Special Access Lines?

(4) Does GTOC's proposal to bifurcate non-recurring charges and recurring rates for DS3 Special Access Lines based on the existence of facilities capable of transmitting DS3 service constitute

(a) an unreasonable discrimination or undue preference in violation of Section 202(a) of the Communications Act based on the customer's location?

(b) an impermissibly vague condition, in violation of Section 61.54(j) of the Commission's Rules, 47 C.F.R. § 61.54(j), for failure to specify the areas in which each rate will apply?

IV. PROCEDURAL REQUIREMENTS

12. GTOC is directed to file its direct case in response to these issues not later than August 4, 1989. GTOC's direct case must supply all information upon which it relies to support its position. The direct case should respond to designated issues by using the numbering system established in paragraph 10, *supra*. Interested parties may file oppositions to GTOC's direct case not later than August 18, 1989. Pleadings opposing the direct cast must be captioned "Opposition to Direct Case" or "Comments on Direct Case" and shall specifically identify the issue and the section of GTOC's pleading to which it responds. GTOC may file a "Rebuttal" to oppositions or comments no later than August 28, 1989. All pleadings must be organized to reflect the issues designated in this Order.

13. *Ex parte* contacts *(i.e.*, written or oral communications which address either the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceed-

ing until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed, on the same day submitted, with the Secretary for inclusion in the public file. A written summary of oral *ex parte* presentations must be served, on the same day presented, on the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200, *et seq.*, of the Commission's Rules, 47 C.F.R. § 1.1200, *et seq.*

V. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that the GTE Telephone Operating Companies Tariff F.C.C. No. 1, Transmittal Nos. 506, 513, 517, 521, and 522 ARE SUSPENDED for one day.

15. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201-205, and 403, and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the issues set forth in Section III, *supra*, ARE DESIGNATED FOR INVESTIGATION in CC Docket No. 89-305.

16. IT IS FURTHER ORDERED that the GTE Telephone Operating Companies may file tariff revisions to advance the effective date of the above-referenced transmittals on not less than one day's notice. For these purposes, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 89-451.

17. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the GTE Telephone Operating Companies shall keep accurate account of all amounts received pursuant to rates for the services which are the subject of the investigation established in this Order.

18. IT IS FURTHER ORDERED that the motion for acceptance of late-filed pleading filed by Intermedia Communications of Florida, Inc. IS GRANTED.

19. IT IS FURTHER ORDERED that the petitions filed by MCI Telecommunications Corporation and Intermedia Telecommunications of Florida, Inc. ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] GTOC Tariff F.C.C. No. 1, Tr. No. 506, Letter of Transmittal at 1. Transmittal No. 506 is scheduled to become effective July 2, 1989, on 45 days' notice.

[2] These revisions also are scheduled to become effective July 2, 1989, on 25 days' notice.

[3] Transmittal No. 517 is scheduled to become effective July 24, 1989, on 45 days' notice. According to GTOC, Transmittal No. 517 was filed to clarify that the previously filed rates are applicable to a "protected" DS3 service. In addition, Transmittal No. 517 adds a rate structure and rates for "unprotected" DS3 service, and sets rates for a "twelve capacity End User SAL" DS3 service. GTOC Tariff F.C.C. No. 1, Tr. No. 517, Letter of Transmittal at 1. Finally, by Transmittal No. 522, GTOC proposes to add a 12 capacity "IC SAL" DS3 offering which it states is offered at the same rates and rate structure as the 12 capacity End User SAL system. GTOC states that this offering was inadvertently omitted from Transmittal No. 517. Transmittal No. 522 is scheduled to become effective July 24, 1989, on 30 days' notice. GTOC Tariff F.C.C. No. 1, Tr. No. 522, Letter of Transmittal at 1.

[4] Transmittal No. 521 is scheduled to become effective August 3, 1989, on 45 days' notice.

[5] Rates for End User SALs are calculated on the basis of a system with total capacity of three DS3 circuits. The first SAL has a distance sensitive rate structure, with a higher charge for the first quarter-mile. Charges for additional quarter-mile segments of the SAL also vary depending on whether facilities capable of transmitting DS3 service presently exist. Additional SALs are not distance sensitive. Rates for IC SALs differ from the End User SAL rate structure in that they are not based on system capacity and all IC SALs are distance sensitive. GTOC Tr. No. 506, Description and Justification (D&J) at 1-2.

[6] Intermedia has also filed a motion to accept its late-filed petition. Intermedia states that it did not learn of the filing until well after the date for filing petitions to suspend and investigate had passed. Intermedia argues that the interests of no party would be prejudiced by grant of its motion because of the pending MCI petition and because of the pendency of the other GTOC filings which employ the same rate structure as Transmittal No. 506. Intermedia's motion is unopposed. We conclude that the public interest would be served by reviewing Intermedia's arguments. We therefore grant Intermedia's motion.

[7] *See* Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (Com.Car.Bur. 1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (Com.Car.Bur. 1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, 4 FCC Rcd 846 (1989); Second Supplemental Order Designating Issues for Investigation, DA 89-529, released May 11, 1989 (Com.Car.Bur.).

[8] MCI's petitions against Transmittal No. 513 and against Transmittal Nos. 517, 521, and 522 are essentially identical to its petition against Transmittal No. 506.

[9] Intermedia also states that recurring charges for IC SALs can be as much as 94.25 percent less than recurring charges for End User SALs. Intermedia Petition at 4 n.2.

[10] Intermedia notes that this factor can produce a difference of up to 93 percent in non-recurring charges and that recurring charges can vary by as much as 92 percent. *Id.* at 4-5.

[11] Intermedia notes that GTOC's tariff does not specify the areas in which DS3 facilities are currently available. Intermedia argues that this omission violates Section 61.74 of the Commission's Rules, 47 C.F.R. § 61.74, which prohibits cross-referencing of other documents in a tariff. Intermedia also appears to argue that GTOC's filing violates Section 61.54(j) of the Commission's Rules, 47 C.F.R. § 61.54(j), which requires that tariff provisions must be stated clearly and definitely. Intermedia Petition at 5

n.6. Intermedia also alleges that GTOC's tariff may constitute geographic deaveraging of access rates, which Intermedia asserts is prohibited by Section 69.3(e)(7) of the Commission's Rules, 47 C.F.R. § 69.3(e)(7).

[12] Intermedia states that end users are limited to a maximum of three lines but that there is no limit on the number of IC DS3 SALs that the customer may obtain.

[13] *See* Second Supplemental Designation Order, note 7, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

UNITED TELEPHONE
OPERATING COMPANIES

Petition for Waiver of Part 69 of the
Commission's Rules

Equal Access End User Restriction
Service

ORDER

Adopted: June 28, 1989; Released: July 3, 1989

By the Chief, Common Carrier Bureau:

1. On June 15, 1989, the United Telephone Operating Companies (United) filed a petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish a separate rate element for the recovery of costs incurred in the provision of a new service called Equal Access End User Restriction Service (EAEURS).[1] Such costs would be recovered through a nonrecurring charge.

2. United states that it has received interexchange carrier (IC) requests for this service and in response to these requests filed Transmittal No. 226 on March 22, 1989.[2] United Petition at 1. Transmittal 226 introduces EAEURS as a new service offering whereby an end user's ability to access the facilities of an IC may be restricted at the request of that IC. *Id.* United asserts that EAEURS will be provided if the IC represents to United that the restriction is requested because of end user account activity involving non-payment of bills, bad credit, or toll fraud. *Id.* at 2. United contends that provision of EAEURS should facilitate ICs' management of their customer accounts, thereby lessening potential financial harm to the general end user community. Therefore, United believes that a grant of this request will serve the public interest. *Id.*

3. The Bureau has reviewed United's petition for waiver and determined that the public interest would be served by permitting United to employ a separate rate element to recover the costs of providing EAEURS. United's request for waiver is consistent with Commission policy that access costs be recovered from the cost causer.

4. Accordingly, IT IS ORDERED that the petition for waiver filed by the United Telephone Operating Companies IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] United Telephone Operating Companies, Petition for Waiver, filed June 15, 1989 (United Petition).

[2] United Telephone Operating Companies, Tariff F.C.C. No. 5, Transmittal No. 226, filed Mar. 22, 1989. Transmittal 226 is scheduled to become effective July 5, 1989. No petitions have been filed against the tariff.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Transmittal No. 1592
Revisions to Tariff F.C.C. No. 12

Custom-Designed Integrated Services

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 1989; Released: June 30, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In its *April 18 Order*[1] the Commission considered whether revisions to Tariff 12 proposed by American Telephone and Telegraph Company (AT&T) were unreasonably discriminatory under Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). The Commission concluded that AT&T's integrated network service offerings under Tariff 12 are not "like" (as that term is used in Section 202(a)) the individual services available on a disaggregated basis under other AT&T tariffs. The Commission also found that, because certain restrictions in AT&T's Tariff 12 offerings unreasonably limited the availability of the service packages, the tariff revisions were unlawful and directed AT&T to file revisions to Tariff 12 to eliminate the restrictions.

2. In response to the *April 18 Order*, AT&T filed Transmittal No. 1592 on May 4, 1989, proposing revisions to its Tariff 12 offerings. Petitions to reject or suspend the revisions proposed under Transmittal 1592 were submitted by the Independent Data Communications Manufacturers Association, Inc. (IDCMA), by MCI Telecommunications Corporation (MCI), and by US Sprint Communications Company Limited Partnership (Sprint).[2]

II. TRANSMITTAL 1592 REVISIONS

3. AT&T's proposed revisions remove all references to the location of Digital Tandem Switching Arrangements, hubs, digital transmission channel (DTC) terminations, and ports from tariff provisions governing the Digital Tandem Switched Network Services (DTSN) and Virtual Telecommunications Network Service (VTNS) offerings. The proposed tariff also affirms the general availability of Tariff 12 offerings to similarly situated customers, without resale or shared use restrictions. AT&T Description and Justification at 4-5. In addition, AT&T has proposed several additional changes to these offerings. Specifically, these revisions (i) permit DTSN and VTNS customers to discontinue those services without liability, if the discontinued service is replaced with another AT&T service; (ii) alter basic and measured charges for VTNS Options I, II, and III, and the change charges for each option; (iii) add additional features to VTNS Option II; (iv) enable customers of Options III and IV to purchase dedicated local access separately; (v) add 1.5 Mbps data transmission capabilities (DTCs) to VTNS Options I and II; and (vi) revise the measured rate schedule mileage bands for VTNS Option III. *Id.* at 5-12.

III. POSITIONS OF THE PARTIES

A. *General Availability*

4. IDCMA asserts that the guidelines stated by the Commission in the *April 18 Order* fail to assure that similarly situated customers will have access to new or modified Tariff 12 packages. IDCMA Petition for Reconsideration at 17-18.[3] IDCMA contends that there are no general availability requirements stated in Tariff 12. Rather, the requirements on existing options are stated in terms of specific numbers of ports and DTCs, for which bundled basic and minimum charges apply. *Id.* at 17. IDCMA argues that there are no eligibility standards expressed in AT&T's tariff. *Id.* at 18. Instead, IDCMA states, AT&T will make individualized decisions in particular cases whether to deal with customers who may want Tariff 12 packages, in direct contradiction of its common carrier obligations. IDCMA contends AT&T will take advantage of unfair joint marketing opportunities created by preliminary negotiations between AT&T and prospective customers. Id. at 18-19.

5. MCI contends on various grounds that AT&T has failed to comply with the *April 18 Order*. According to MCI, the proposed tariff retains geographic restrictions found unlawful in the *April 18 Order*. MCI Petition at 1-3. While VTNS is provided to four users rather than one, MCI asserts, it remains impossible for other potential users to determine the nature and scope of the offering. For example, MCI observes that the terms and conditions, including the prices, of VTNS Options I and II, would vary as to users with different quantity requirements at different geographic locations. Such variations are incompatible with general availability, MCI asserts. *Id.*

6. Sprint also maintains that the revised offerings contain restrictions that impose arbitrary limits on their availability. Sprint notes that VTNS options will be designed by AT&T based on customer-specific information, and argues it is highly improbable that another customer would require an initial configuration identical, or even similar, to the original customer's. Sprint Petition at 4. Sprint declares that DTSN is restricted to "a combined minimum capacity of 4400 DS-0 terminations at no more than eight central office locations," and contends such restrictions are comparable to the geographic restrictions found unlawful by the Commission. *Id.*

7. AT&T replies that the tariff revisions proposed by Transmittal 1592 have removed the geographic restrictions found unlawful in the *April 18 Order*, and explicitly undertake to make Tariff 12 offerings generally available. AT&T Reply at 3, 7. AT&T contends that these provisions fully comply with the Commission's requirements, and that all relevant rates, terms, and conditions for Tariff 12 services are specified in the tariff. *Id.* at ii-iii, 14 n.****. AT&T adds that its affirmative statement of general availability is consistent with court decisions which have found that the requirement of availability demands that the supplier take affirmative action to inform the customers of the availability of the offer. *Id.* at 8. AT&T also states that no customer has been denied service under the

DTSN terms and conditions. *Id.* at 7-8. Other restrictions in Tariff 12 are not *per se* unlawful, AT&T asserts; it notes that in the *April 18 Order* the Commission stated that, absent indications that customers are being denied integrated service packages on the basis of such specifications, it did not anticipate suspension or rejection for lack of such availability. *Id.* at 11.

B. ***Resale and Shared Use***

8. MCI characterizes the Commission's prohibition of restrictions on resale and shared use as "the most significant 'check' the Commission has yet devised to ensure that targeted carrier offerings are properly priced." MCI Petition at 7. MCI accuses AT&T of confusing the issue, and insists that the question is not whether restrictions on resale appear within the "four corners" of the tariff, but rather, whether there are improper restrictions on service availability. *Id.* at 8.

9. AT&T states in its reply that no restrictions on resale appear in the tariff, so that existing Tariff 12 customers are free to resell by establishing disaggregated rates for service as they see fit. AT&T adds there has never been a restriction limiting the availability of Tariff 12 services, and that the tariff language assuring general availability permits potential customers, including those seeking to resell services, to request a custom-designed Tariff 12 offering or reasonable modifications to an existing service. AT&T Reply at 9-10.

C. ***Discriminatory Rates***

10. MCI asserts the proposed rates establish unlawful preferences that benefit the class of customers with sufficient power first to negotiate, and then force a renegotiation of, Tariff 12 arrangements. MCI Petition at 10-11. MCI states that the extended terms negotiated by AT&T with customers for the first three VTNS options initially bound those customers to higher rates than suggested by the long-term decline in transmission prices, and notes that AT&T by the proposed revisions now seeks to reduce those prices substantially. MCI argues that these reductions raise the issue whether ratepayers of less competitive services are made to suffer by AT&T's abandonment of contractual rights under which AT&T would have received greater revenues. MCI states that its review of the economic support data provided by AT&T indicates they are incomplete, imprecise, and fail to demonstrate that the repriced services would be compensatory. *Id.*

11. Sprint contends that while the *April 18 Order* determined that geographic restrictions sufficed to render the tariffs unlawful, other restrictions "could be subject to abuse." Sprint contends this problematic category includes specification of ports and data transmission capabilities for individual offerings, combined with a customer option to add or delete ports or DTCs, or unjustified variations in mileage bands. Sprint Petition at 2-3. As to the treatment to be accorded other customers seeking integrated service packages "under conditions not substantially different" from those in existing Tariff 12 offerings, Sprint states that AT&T has parroted the "substantial difference" phrase from the *April 18 Order* while not satisfying Section 61.55(i) of the Commission's Rules, 47 C.F.R. § 61.55(i), because the proposed revisions establish no criteria to determine when differences are substantial. *Id.* at 6.

12. AT&T replies the *April 18 Order* made clear that non-geographic restrictions (such as the number of particular service elements, or ordering periods) would not be considered unlawful absent unreasonable specificity in the terms, or denial of service to a prospective customer "with a substantially similar request." AT&T Reply at 10. AT&T states that no customer has come forward to assert such a denial of service, nor to complain of unreasonably discriminatory treatment arising from specific restrictions, and iterates that the *April 18 Order* emphasized the Commission's reliance on its complaint process to address such concerns. *Id.* at 11. Finally, AT&T argues, Sprint is incorrect in contending that the VTNS rate differences are unreasonably discriminatory, noting that Sprint concedes the improbability that one customer's optimal design will be similar to another's.

D. ***Cost Support and Demand Projections***

13. MCI states that AT&T's cost support materials are incomplete and imprecise, and fail to justify AT&T's abandonment of its right to higher prices from customers under existing contracts for integrated offerings by proposing significant price reductions in Transmittal 1592. MCI Petition at 10-11. Sprint contends the integrated service packages are incompatible with the private line rate structure guidelines contained in Section 61.40 of the Commission's Rules, 47 C.F.R. § 61.40. Sprint maintains this demonstrates that each of the several basic charges constitutes simply an individual price for a unique configuration. Sprint Petition at 6-7. Sprint states the Tariff 12 rate structure for measured charges is also inconsistent. *Id.* at 7-10.

14. Sprint argues that the Tariff 12 structure violates Section 61.40(a)(3) of the Commission's Rules, 47 C.F.R. § 61.40(a)(3), which requires that rate elements appearing separately in one rate structure appear separately in all other structures. Because the charges for each type of port or data transmission capability subsumed within the basic charge are nowhere specified, Sprint contends, this charge constitutes an impermissibly bundled component. *Id.* at 10-11. Similarly, Sprint asserts that the Commission's general guideline requiring that volume discounts be integrated into a rate structure of similar offerings is not complied with because the structures forming the basis for volume discounts exhibit no consistency, nor is there any explicit demonstration of the relationship between volume of traffic and the consequent usage rates, which vary for the different options without explanation. Sprint Petition at 10-12.

15. Sprint states that the cost support provided for VTNS offerings includes almost no information on the development of changes to AT&T's interstate financial results for 1990, and asserts this is a violation of Section 61.38(c) of the Rules. Sprint also argues that the absence of any cost support for DTSN constitutes a failure to justify the discrimination between charges for that service and for other like services in Tariff 12. *Id.* at 13. Respecting revenue levels, Sprint contends that AT&T's reductions and revisions to VTNS charges are accompanied by unreasonably high revenue projections. *Id.* at 14-16. Sprint also states that AT&T provides only cursory explanation of how it allocated expenses to the Tariff 12 offerings, but that even this limited information demonstrates that expenses have been reduced, without justification, in comparison with earlier filings for the same offerings. *Id.* at 17.

16. AT&T states in its reply that its cost support material included fully distributed cost (FDC) showings at category and total interstate levels, made separately for each VTNS option and for all the options combined; and net revenue (revenue less cost) analyses both at estimated and minimal demand levels. AT&T asserts the Commission has found that such a positive net revenue showing addresses concerns of unreasonable discrimination or cross-subsidy, and the materials submitted in support of Transmittal 1592 have included demand and cross-elastic impacts. AT&T Reply at 15-16.

17. AT&T explains the different revenue projections for VTNS Option I by its use of different assumptions respecting cross-elastic impact. Option II revenues, projected to decline by less than a proportional amount compared to Option II usage rates, do so because of offsetting demand increases for elements outside the usage rates -- *i.e.*, optional features. *Id.* at 17-18. AT&T also states that Sprint has challenged the projected revenues for Option III Switched Service, on the basis of a miscalculation of demand for measured usage. Similarly, AT&T asserts that Sprint's projected increase for Option IV private line revenues ignores the effect of AT&T's altered cross-elasticity assumptions. *Id.* at 18-19. AT&T states that Sprint's separate assertion of understated expenses in fact is explained by expense changes since the initial filings, recognized through updated Private Line Investment and Annual Cost (PLIAC) and Network Cost System (NCS) computations that reflect network upgrading and cost savings. According to AT&T, Options I and II show this most dramatically because more time has elapsed since their initial filing. *Id.* at 19-21. AT&T contends that Sprint's attempt to compare Option II expense projections with actual results is distorted by its selection of the start-up year. *Id.* at 21-22. Finally, AT&T states, its decrease in carrier's carrier expense for Option II reflects that virtually all switched access used for that option is terminating rather than originating.

E. *Computer II Compliance*

18. IDCMA contends that the creation and marketing of Tariff 12 packages, because premised on individualized negotiations with AT&T prior to tariffing service options and the particularized structure of the tariffed options that result, fails to conform with the Commission's guarantee to AT&T's competitors in nonregulated activities of equal access to basic transmission services. Noting post-*Computer II* decisions by the Commission that were intended to assure customer premises equipment (CPE) competitors nondiscriminatory access to AT&T's regulated services, and the comparably efficient interconnection safeguard established by the *Computer III* regulatory structure, IDCMA asserts that effective competition with AT&T in the systems integration marketplace requires that its members have access to regulated services on the same terms and conditions as when marketed by AT&T. IDCMA Petition at 5-9.

19. AT&T replies that asserted violations of the *Computer II* rules with respect to untariffed practices are not appropriate for consideration in a tariff proceeding, and states it will respond to IDCMA's contentions in the reconsideration context. AT&T Reply at 3 n.* & n.**.

IV. DISCUSSION

20. The Common Carrier Bureau has reviewed AT&T's Transmittal No. 1592, the petitioners' assertions, and related pleadings. We conclude that no compelling argument has been presented that the proposed tariff is so patently unlawful as to warrant rejection, whether grounded in an alleged by failure to comport with the *April 18 Order* or with other Commission requirements, and that a renewed investigation of AT&T's Tariff 12 offerings is not warranted. However, with respect to certain of the concerns urged by petitioners, it appears useful to reiterate certain established Commission requirements, and describe how our commitment to their consistent application will operate in the context of integrated service packages.

21. For example, with respect to petitioners' contentions that the tariffed offerings are not sufficiently specific to establish their general availability, or fail to comport with Section 61.54(j) of the Commission's Rules, 47 C.F.R. § 61.54(j), AT&T states in its reply (at ii-iii and 14 n.****) that Tariff 12, as revised, comports with the requirements of the *April 18 Order*, and with other Commission requirements governing the tariffing of relevant terms and conditions.[4] AT&T reiterated this position in an ex parte presentation made June 22, 1989, and emphasized in its notification of that meeting that the "tariff contains *all* terms, conditions and rates for VTNS."[5] Our reading of the tariff suggests no basis for questioning AT&T's characterization; indeed, as AT&T states, the asserted failures of specificity do not even appear to relate to the revisions made by Transmittal 1592, but instead to the offering's basic structure. In any case, to the extent that possible ambiguities of interpretation arise, the questioned terms will, consistent with established practice, be resolved in favor of the customer.

22. Specifically, we shall construe the absence of specified geographic locations in the tariff to assure the availability of Tariff 12 options at any AT&T location, as this broad availability is the essence of the requirement in the *April 18 Order* that AT&T remove the original geographic restrictions. We therefore do not anticipate that requests for arrangements to provide custom-designed service configurations, when otherwise comparable to existing Tariff 12 options, would represent a substantial difference (warranting AT&T's denial of service) simply because the request for service specifies different locations than those involved in the provision of service to the existing customer(s). Similarly, whatever the role of the Network Provisioning Plan in contractual negotiations between AT&T and prospective customers, or the technical arrangements for provision of service, the NPP is not an eligibility requirement that restricts the general availability of Tariff 12 options. Finally, while we expect that Tariff 12 options will continue to reflect customer commitments in excess of a year, as the extended term is an attribute distinguishing these arrangements from shorter-term alternatives, we do not regard variations in such extended terms as constituting a substantial difference in the service provided. Thus, while a Tariff 12 option initially offered and priced on the premise of a particular term might be priced differently for a customer seeking a different, but still extended term, we would regard this as a reasonable modification that AT&T should be prepared to make.[6]

23. Our determination that no further action is warranted in these respects does not preclude further action, in the complaint or tariff contexts, should subsequent events warrant review of AT&T's practices in the development and tariffing of integrated service packages. We note with regard to the contracts negotiated between AT&T and prospective Tariff 12 customers that the Commission possesses the authority under Section 211 of the Communications Act, 47 U.S.C. § 211, to require the filing of any contracts of any carrier, and may exercise that authority on an occasional basis to assure that AT&T's contracts negotiated in connection with Tariff 12 arrangements comport with Commission requirements.

24. Finally, we cannot conclude that additional action in regard to Tariff 12 is required at this time to assure AT&T's compliance with the Commission's *Computer II*[7] and *Computer III*[8] decisions. The Bureau's commitment to enforcement of the requirements established by those decisions remains unwavering,[9] and the distinctive nature of Tariff 12 offerings noted by the Commission in its *April 18 Order* does not affect AT&T's obligation to comply with these requirements. However, we find no evidence of practices arising from the provision of integrated service packages that require a change in the tariff provisions or other action by the Bureau.

25. In these circumstances, we believe the petitions should be denied. The tariff revisions set forth in Transmittal No. 1592 will become effective on July 2, subject, of course, to any rulings the Commission may make in disposing of petitions for reconsideration of the *April 18 Order*.

26. Accordingly, IT IS ORDERED that the petitions to reject or to suspend and investigate American Telephone and Telegraph Company Transmittal No. 1592, filed by the Independent Data Communications Manufacturers Association, Inc., by MCI Telecommunications Corporation, and by Sprint Communications Company Limited Partnership, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568, Memorandum Opinion and Order, FCC 89-116, released Apr. 18, 1989 (*April 18 Order*).

[2] IDCMA's petition incorporates by reference its petition for reconsideration of the *April 18 Order*.

[3] While we have generally limited our consideration of petitioners' contentions to matters not compassed by the pending reconsideration of the Commission's *April 18 Order*, IDCMA's petition directed to Transmittal 1592 principally relies on its incorporated petition for reconsideration. The latter document in some respects contends that, even accepting the premises of the *April 18 Order*, AT&T's compliance with it would leave other deficiencies unresolved. Where we consider that IDCMA's petition for reconsideration could reasonably be construed as a challenge to AT&T's actual compliance with the *April 18 Order*, or as asserting that deficiencies outside the scope of that Order are presented by Transmittal 1592, we have here considered the petition in that light.

[4] AT&T states in its Reply at ii-iii:

> The tariff provisions informing customers of the availability of Tariff 12 services are clear, unequivocal and fully sufficient to comply with the Commission's requirements . . . . AT&T's tariff support materials not only meet, but exceed the requirements of the Commission's Rules.

Further, at 14 n.****:

> [A]ll relevant rates, terms and conditions for Tariff 12 services are specified in the tariff.

[5] Letter from T. Norris, AT&T, to Secretary, FCC, June 22, 1988 [sic].

[6] *See April 18 Order* at para. 56.

[7] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Computer II*), *Final Decision*, 77 FCC 2d 384, *recon.* 84 FCC 2d 50 (1980), *further recon.* 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further recon.* FCC No. 84-190, released May 4, 1984.

[8] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) *(Phase I Order)*, *modified on reconsideration*, 2 FCC Rcd 3035 (1987) *(Phase I Reconsideration)*, *further reconsideration*, 3 FCC Rcd 1135 (1988) *(Phase I Further Reconsideration)*, *second further reconsideration pending*, *appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and *sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 *(Phase II Order)*, *modified on reconsideration*, 3 FCC Rcd 1150 (1988) *(Phase II Reconsideration)*, *further reconsideration pending*, (pet. for rev. filed Apr. 20, 1988), *California v. FCC*, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988) and *Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988).

[9] *See, e.g.*, AT&T Communications, Megacom Promotional Offering (Transmittal No. 1568), DA 89-622, released June 8, 1989 (Com. Car. Bur.). In that decision, the Bureau rejected as patently unlawful AT&T's proposal to provide customers with customer premises equipment gratis as an incentive to subscribe to its Megacom, Megacom 800, and Software Defined Network services, because constituting "the forbidden tariffing and bundling of unregulated CPE with regulated transmission services." *Id. at para. 13.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS — Transmittal No. 1651

Revisions to Tariff F.C.C. Nos. 9 and 11

ORDER

Adopted: June 29, 1989; Released: June 30, 1989

By the Chief, Common Carrier Bureau:

1. By the captioned tariff revisions, AT&T Communications, Inc. (AT&T) proposes to introduce a nationwide promotion for 19.2 kbps Dataphone Digital Service (DDS) under which AT&T will waive the nonrecurring charges for 56 kbps digital data local channels, 56 kbps secondary channel options, and each 19.2 kbps central office connection ordered. The proposed promotion would be available to any customer that places a new DDS order between July 3, 1989, and October 3, 1989. The captioned tariff revisions are scheduled to become effective July 3, 1989.[1]

2. On June 26, 1989, US Sprint Communications Corporation Limited Partnership (US Sprint) filed a petition to reject or suspend and investigate AT&T's proposed tariff revisions. US Sprint asserts that the captioned filing is one of AT&T's first new service offerings under the Commission's recently adopted system of incentive regulation of AT&T.[2] US Sprint argues that we should therefore make clear that AT&T will be required to meet the standards for justifying a proposed new service. According to US Sprint, AT&T has failed to do this. Specifically, US Sprint contends, AT&T has failed to provide sufficient data for the Commission to determine whether the proposed promotion would generate positive net revenues. US Sprint Petition at 1-3.

3. The Common Carrier Bureau has reviewed the tariff transmittal and US Sprint's petition. We conclude that no compelling argument has been presented that the proposed tariff is patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time. The Description and Justification that AT&T submitted with Tramsmittal No. 1651 indicates that the proposed promotion will produce positive net revenues, on a present value basis, within the first year in which it is offered. AT&T Tr. No. 1651, D&J, at 2-3.

4. Accordingly, IT IS ORDERED, that the petition to reject or alternatively suspend and investigate the captioned transmittal by US Sprint Communications Corporation Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T requested waiver of Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, to permit the captioned filing to become effective on less than 45 days' notice. The Tariff Division granted AT&T's application for special permission and assigned Special Permission No. 89-425.

[2] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Pinewood, South Carolina)

ORDER DENYING EXTENSION OF TIME

Adopted: June 29, 1989; Released: July 3, 1989

By the Chief, Allocations Branch:

1. On June 1, 1989, Pinewood Broadcasting Partnership ("PBP") filed a petition for reconsideration of the Commission's letter dismissing its request to allot Channel 238A to Pinewood, South Carolina.[1] Millennium Communications of Charleston, Inc. ("Millennium"), licensee of Station WWWZ-FM, Summmerville, South Carolina, filed an Opposition to the petition for reconsideration.

2. On June 28, 1989, PBP timely filed a request for an extension of time to and including July 21, 1989, in which to reply to Millennium's Opposition. It states that the additional time is needed because of the press of other business. PBP goes on to submit that counsel for Millennium has indicated that it will interpropose no objection to the request.

3. Section 1.46 of the Rules states that it is not Commission policy to routinely grant requests for extension of time. We find that PBP's claim that such time is needed due to the press of other business is not a sufficiently compelling reason which would warrant a waiver of the Commission's policy concerning extension of time requests.

4. Accordingly, IT IS ORDERED, That the Request for Extension of Time IS DENIED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Public Notice of the filing of the petition for reconsideration was given on June 7, 1989, Report No. 1783 (54 FR 15493, published June 15, 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 7, 1989

Commissioner Patricia Diaz Dennis releases separate statement in Second Report and Order, FCC 88-407, released February 23, 1989, 4 FCC Rcd 1741.

FEDERAL COMMUNICATIONS COMMISSION

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

Concurring in part, dissenting in part

In Re: Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules.

I concur that the FCC's strict prohibition on common ownership of radio and television stations in the same market should be modified. Because of the dramatic growth in the number of media outlets, I agree that we could authorize a limited number of radio-television combinations in the largest markets without significantly undermining diversity.

Nevertheless, I must dissent in part, because the majority has travelled far down the road towards abandoning the Commission's longstanding commitment to diversity. Indeed, the majority makes a "U turn" from the Commission's four- and five-year-old regional and national ownership policy statements. Ultimately, the idea of local diversity stems from a Jeffersonian distrust in the concentration of power--whether in private or public hands. It stems from a commitment to diffusing the power to join in public debate and to shape public opinion. This commitment is embodied in the First Amendment. I still believe that local ownership rules make it easier for iconoclastic, provocative voice to be heard, and that the public benefits from hearing them.

To protect this important public interest, I would have taken a different approach to the Commission's one-to-a-market rule. First, I would insist on preserving considerably more local diversity before authorizing any new combinations. The majority finds that 30 voices in a market represent "enough" diversity to warrant allowing a combination; I would insist on at least 45 voices and 65 stations in the market before permitting radio-TV combinations. Such an approach would restrict the effect of the change to the top 10 or 15 markets.

Second, I would treat television voices differently from radio. The majority relies on a simple voice count, in which radio stations are treated the same as television stations. The majority's approach ignores the differences between radio and TV. Television stations generally cover a wider area, attract a larger audience, and have more impact on public opinion than radio stations. For that reason, I would permit radio-TV combinations only in markets where there were at least ten television stations, representing substantial diversity among the TV outlets.

Third, I would have adopted a hard-and-fast rule, rather than proceeding by waiver. In markets that do not meet the numerical guidelines I have proposed, I would strictly enforce the one-to-a-market rule. Government generally governs best and intrudes least by setting clear, predictable rules by which its citizens and business decisionmakers can organize their conduct. A waiver policy opens the door to inconsistent results and, as experience show, often leads to erosion of the underlying rule.

By adopting this 10/45/65 standard, the Commission could have granted more flexibility to licensees in the largest markets, while reaffirming our commitment to diversity. The majority, unfortunately, goes too far. The effect of the majority's decision is sadly predictable. The Commission has been almost irresistibly inclined to grant waivers once it invites waiver applications. The UHF Note 4 policy is a good example. We have granted almost every waiver request. I fear that we are headed down the same road now. In markets where there are at least 30 voices, it will be practically impossible to deny waiver requests. This covers markets far beyond the top 25. For example, Louisville, Dayton, Birmingham, and Greensboro--markets 47, 48, 49, and 50--all qualify under this standard. Even markets as small as Albany (#52), Jacksonville (#57), Flint (#59), and Fresno (#63) appear to have at least 30 voices. In those markets, I believe the majority's decision, as a practical matter, amounts to repeal of the one-to-a-market rule.

Yet even where there are fewer than 30 independent voices, the majority has thrown open the door for waiver requests. In the past, we permitted waivers of our one-to-a-market rule, but we made it clear that applicants faced a high hurdle and that we would not usually grant waivers. In the wake of the majority's decision, we will not routinely consider factors such as: the efficiencies resulting from the combination, alleged economic hardship, and the type of facilities involved. Now that the Commission has extended the invitation, I suspect we will regularly receive--and grant--waiver requests even for small markets where diversity would be most endangered.

Promoting diversity on the local level has been a core Commission goal for more than 20 years. As recently as 1985, the Commission justified relaxing regional concentration rules by citing the "proven effectiveness" of the local ownership rules in achieving diversity.[1] *Memorandum Opinion and Order* in Docket No. 84-19, 100 FCC 2d 1544, 1550-51. The Commission has stated:

> In reexamining the need for our regional concentration of control provisions, it is critically important to recognize that the Commission's other multiple ownership rules, particularly its local market restrictions, will continue to restrain group ownership, often more stringently, in many situations that would have been subject to the regional limitations. *Report and Order,* 101 F.C.C. 2d, 402, 412 (1984).

Because we relaxed the regional and national ownership rules based on the vitality of our local ownership restrictions, we should be extremely cautious in weakening the diversity safety net of the local rules. The majority's approach rips gaping hole in that net.

FOOTNOTES FOR STATEMENT

[1] The Commission has changed many of its policies over the years, but we have not wavered in our commitment to diversity on the local level until now because, as the Supreme Court stated:

> The "'public interest' standard necessarily invites reference to First Amendment principles," *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973), and in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978). In 1965, the Commission identified "a maximum diffusion of the media of mass communications" as one of the "two primary objectives" in licensing new broadcast stations. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394 (1965).

The Commission noted:

> That radio and television broadcast stations play an important role in providing news and opinion is obvious. That it is important in a free society to prevent a concentration of control of the sources of news and opinion and, particularly, that government should not create such a concentration, is equally apparent, and well established. *United States v. Storer Broadcasting Co.*, 351 U.S. 192; *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 89 U.S. App. D.C. 13, 189 F.2d 677, *cert. den.* 342 U.S. 830.

Id. at 394, n. 4.

The Commission decided that other media interests in the station's community of license would generally be most significant, followed by other interests in the station's service area. *Id.* at 394. That 1965 policy is still in effect today.

The Commission later relied on the one-to-a-market rule to justify relaxing its rules on regional and national concentration of control. After repealing the regional concentration rule, the Commission dismissed a petition for reconsideration, saying:

> [It] does not discuss our finding that, in addition to the overall growth in the marketplace, the need for the regional rule has also been lessened by the proven effectiveness of the "duopoly" and "one-to-a-market" rules. *Memorandum Opinion and Order*, 100 F.C.C.2d 1544, 1551.

Similarly, when the Commission relaxed the Seven Station Rule, it said:

> . . . the lack of relevance of a national ownership rule to the availability of diverse and independently owned radio and TV voices to individual consumers in their respective local markets lead[s] us to conclude that the rule is unnecessary to achieve that objective;. . . *Report and Order*, 100 F.C.C.2d, 17, 19 (1984).

The Commission concluded:

> . . [W]e believe that the more correct focus for addressing viewpoint diversity and economic competition concerns is the number and variety of information and advertising outlets in local markets, a matter that is not addressed by a nationwide restriction on ownership. *Id.* at 20.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-301

In the Matter of

Revocation of License of

JHP PARTNERSHIP File No. 13998-CL-CP-133-A-86

Nonwireline cellular licensee of
Station KNKA483 in the
Manchester-Nashua, New Hampshire MSA

Appearances

Alan Y. Naftalin and *Herbert D. Miller, Jr.* on behalf of United States Cellular Corporation; *David L. Hill* on behalf of Jalal Hashtroudi and Robert A. Pelissier, JHP Partnership; and *Thomas D. Wyatt* on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: June 29, 1989; Released: July 11, 1989

PRELIMINARY STATEMENT

1. This is a ruling on a Joint Motion For Summary Decision ("Joint Motion") filed on April 21, 1989, by the parties to this proceeding: Jalal Hashtroudi, Robert A. Pelissier, JHP Partnership (collectively "JHP"), United States Cellular Corporation ("USCC"), and the Common Carrier Bureau of the Federal Communications Commission ("Bureau"). This decision is rendered incident to a settlement and a stipulated record. Sanctions can be imposed on consideration of those parts of the record relied on by the parties and supported by reliable, probative and substantial evidence. 5 U.S.C.A. §556(d). However, the Presiding Judge's decision incident to imposing sanctions must include a statement of findings, conclusions, and reasons. 5 U.S.C.A. §557(c)(A).

2. The case was initiated under *Order To Show Cause And Hearing Designation Order*, DA 88-898, released June 15, 1988, wherein the Bureau designated the following issues for adjudication:

(1) To determine the facts and circumstances surrounding the sale of Jenkins' partnership interest of USCC.

(2) To determine the facts and circumstances of the "restated partnership agreement" and the relationship between USCC and the other JHP partners.

(3) Whether, in view of the evidence adduced under the foregoing issues, the non-wireline cellular license for the Manchester-Nashua, N.H. MSA has been the subject of one or more unauthorized transfers of control in violation of Section 22.39 of the Commission's Rules.

(4) Whether, in view of the evidence adduced on the foregoing issues, the non-wireline cellular license for the Manchester-Nashua, N.H. MSA should be revoked or some other sanction be imposed.

Through stipulation of counsel of the Bureau and counsel for the Respondents, those four issues were reduced to three controlling issues:

A. Whether Messrs. Hashtroudi and Pelissier acquired negative control of the JHP Partnership in violation of Section 22.39(a)(1) of the Commission's Rules in connection with or as a result of the transactions referenced in Joint Stipulation Numbers 18 and 23.

B. Whether the JHP Partnership was the subject of an unauthorized transfer of control in violation of Section 22.39(a)(1) of the Commission's Rules as a result of the transactions referenced in Joint Stipulation Numbers 23 and 26.

C. If Issues 1 and/or 2 above are resolved against the respondents, what sanction, short of revocation, if any, would be appropriate under the factual circumstances of record.

3. Under the designation order, the Bureau was assigned the burden of proof and the burden of proceeding. Upon assignment of the case, the Presiding Judge entered an injunctive stay prohibiting any transfer of an interest in JHP Partnership *pendente lite* in order to preserve the *status quo* during adjudication. *See Order*, FCC 88M-1978, released June 27, 1988.[1] A prehearing conference was held on August 18, 1988, and procedural dates were set, including a hearing date of February 13, 1989. *See Order*, FCC 88M-2697, released August 22, 1989. The Bureau commenced document discovery and under a contested ruling, the production of various documents was ordered. *See Memorandum Opinion and Order*, FCC 88M-3295, released October 5, 1988. Thereafter, the Bureau sought to compel answers to interrogatories and answers were ordered to be made. *See Memorandum Opinion and Order*, FCC 88M-3701, released November 2, 1988. Also, deposition testimony was taken by the Bureau in connection with its trial preparation.

4. A conference was held on January 18, 1989, and procedures were set for resolving the issues by summary decision, including acceptance of a Stipulation of Fact filed on January 17, 1989. *See Order*, FCC 89M-209, released January 23, 1989. Shortly thereafter, the procedural and hearing dates previously set were cancelled so that the parties could focus on papers for a ruling by summary decision. *See Order*, FCC 89M-244, released January 24, 1989. The Bureau filed a Motion For Summary Decision on February 21, 1989.[2] The parties then requested a prehearing conference and one was held on March 16, 1989. A subsequent conference was held on March 23, 1989, and based on matters raised and dis-

cussed at that conference the parties were ordered to proceed by the Joint Motion which is now under consideration.

5. The Joint Motion contains Stipulations Of Fact which serve as part of the record for determining whether there is any genuine issue of material fact requiring a hearing. It is based on Joint Exhibits to Common Carrier Bureau's Motion For Summary Decision ("Joint Exhibits") that were filed on February 22, 1989.[3] There is also included immediately following the Stipulations Of Fact, an Outline Of Settlement Agreement that specifies the terms of a settlement under which the Joint Motion was filed. The portions of the Settlement Agreement that are accepted by the Presiding Judge are those relating to a penalty if $10,000 to be paid by USCC and a transfer to Messrs. Hashtroudi and Pelissier of 0.10% of USCCNH's interest in the JHP Partnership. However, the Presiding Judge is not bound by provisions in the Settlement Agreement for findings (Para. F) or conclusions (Para. G). The parties were notified at a conference held on June 22, 1989, that the Presiding Judge would not be bound by the above-referenced paragraphs of the Settlement Agreement and the parties have filed an appropriate Stipulation dated June 22, 1989.

6. Now the Joint Motion is in an appropriate procedural status for a ruling on-the-merits. The Stipulation Of Facts filed on January 17, 1989, are accepted and relied upon by the Presiding Judge. However, only those facts that are required to show that this ruling is based on substantial evidence will be cited in this decision. Similarly, all documents submitted with the Joint Motion are relied on in this decision but only those needed to support the ruling will be specifically referenced. (The citation to a document will be "Jt. Exh. _____" and the citation to a Stipulation will be "Stip. _____.") It is noted that the findings and conclusions made in this decision are solely for the purpose of resolving this litigation by settlement without the need for a hearing, and the disposition of this case is made by summary decision in light of the fact that the Bureau is an active participant seeking the relief granted below in the public interest.

Stipulated Facts

7. A partnership agreement was entered into among Messrs. James F. Jenkins, Robert A. Pelissier, and Jalal Hashtroudi dated September 26, 1985. The partnership was called the JHP Partnership or "JHP." Its purpose was to acquire FCC Cellular Telephone License Applications. Profits and losses were to be shared in proportion to capital invested. Each partner was to share equally in management. (Jt. Exh. 1.) On February 5, 1986, JHP filed a cellular application for the Manchester-Nashua New England County Metropolitan Area ("NECMA"). Upon being identified as the tentative selectee, on June 3, 1986, and July 14, 1986, JHP filed amendments to its application pursuant to the Commission's Rules. On October 27, 1986, JHP's application was granted by the Commission and JHP's initial license was granted in May of 1988. (Stip. 1.)

8. Mr. Hashtroudi is a resident of Carmichael, California. He was one of the three original partners of JHP and continues to hold an interest in JHP. Mr. Pelissier is a resident of Redwood City, California. He was one of the three original partners of JHP and continues to hold an interest in JHP. Mr. Jenkins was a resident of San Francisco, California prior to his death which is believed to have occurred in November 1987. He was one of the three original partners of JHP. (Stip. 2-4.)

9. Mr. David L. Hill is an attorney who has represented JHP since on or about May of 1986. Since the admission of USCCNH as a partner to JHP, Mr. Hill has acted on behalf of Messrs. Hashtroudi and Pelissier in all matters relating to USCC'S performance under the Management Agreement. (Stip. 14.) Mr. Alan Naftalin is a partner in the law firm of Koteen & Naftalin, which represents TDS, the parent of USCC. (Stip. 5, 13.)

10. USCC is a subsidiary of Telephone and Data Systems, Inc. (TDS); United States Cellular Corporation of New Hampshire (USCCNH) is a wholly owned subsidiary of USCC. (TDS, USCCNH and USCC are referred to herein as "USCC" unless the context requires otherwise.) Commencing shortly after the identification of JHP as the tentative selectee for the Manchester-Nashua NECMA in May 1986, USCC through TDS, and other unrelated entities, entered into negotiations with the Messrs. Jenkins, Hashtroudi and Pelissier for the ultimate acquisition of their interests in JHP and the Manchester-Nashua cellular license. (Stip. 16.)

11. Under a letter agreement dated November 1, 1986, between Mr. Jenkins and Mr. Mark Barquera, President of United International Cellular, Inc. ("UIC"), Jenkins authorized UIC to act as his exclusive representative "in selling and transferring his interest in the Manchester-Nashua (NECMA) Cellular System" to USCC. UIC was to "negotiate specific terms, arrangements and timing for transfer of [Jenkins'] equity interest." Jenkins signed his name on behalf of himself and on behalf of the JHP Partnership but there is no evidence that the other partners were made aware. (Jt. Exh. 5.)

12. On November 7, 1986, a Purchase Agreement was executed by Jenkins and USCC. Jenkins did not sign on behalf of JHP Partnership and only Jenkins is to be bound in accordance with its terms and conditions. The closing date for transfer of Jenkins' equity interest was described, but not specified. (Jt. Exh. 6.)

13. A draft letter was prepared on November 7, 1986 which contained an offer from TDS to Messrs. Hashtroudi and Pelissier, offering to purchase their respective 25% interests at the same unit price and under the same terms and conditions as the Jenkins deal. There is no evidence that this letter was executed and there is no reference to the transfer of Jenkins' partnership noted. (Jt. Exh. 8.) It is found that TDS' offer was not accepted.

14. Prior to December 15, 1986, Mr. Naftalin met with attorneys for USCC. Those attorneys advised that under California law, Mr. Jenkins was not legally capable of transferring his voting right in the JHP Partnership, that USCC's acquisition of Jenkins' equity would not terminate the partnership, and that no control or right to participate in partnership affairs passed under the Purchase Agreement of November 7, 1986. Based on that information, Mr. Naftalin opined that Commission consent would not be needed for the Jenkins assignment and that if USCC were later admitted as a JHP partner, no transfer of control would occur because USCC would hold only one of three votes. USCC relied on Mr. Naftalin's advice and acted thereafter on a reasonable belief that it was not a party to an unauthorized transfer of control in violation of the Commission's rules. (Stip. 20.)

15. On November 10, 1986, a partnership meeting was held in San Francisco. Mr. Jenkins decided not to attend. Concern was raised by the partners about Mr. Jenkins' unilateral action in a proposed sale of his partnership interest. Messrs. Hashtroudi and Pelissier established by vote that thereafter, any partnership document would require the signature of two partners in order to bind the partnership. (Jt. Exh. 10.)

16. On November 11, 1986, Mr. Hill notified the Commission of a change in the JHP Partnership's address from Mr. Jenkins' address to Mr. Pelissier's address. (Stip. 19.)

17. On December 15, 1986, Mr. Jenkins signed an Assignment Of Partnership Interest which recited in pertinent part:

> The Seller [Jenkins] hereby sells, grants, transfers and assigns all of its (sic) right, title and interest in the Partnership, this being a 50% partnership interest - - - to the Buyer [USCC] in consideration for $760,672, the receipt of which is hereby acknowledged.

(Jt. Exh. 11.) There is no reference in the document to Jenkins' right to one vote in the partnership. The next day, December 16, 1986, Mr. Naftalin advised Mr. Hill by letter of the Jenkins' assignment and in that letter Mr. Naftalin confirmed his opinion that:

> this acquisition did not require prior consent from the FCC because no transfer of control of the permit was involved in the transaction [because] (a) under the partnership agreement and the applicable law, Mr. Jenkins is one of three equal partners with respect to management and control, even though he made 50 percent of the investment, and (b) as of now, USCC has acquired only a beneficial interest in Mr. Jenkins' Partnership position, since USCC has not been admitted to the partnership and you have advised us that the other two partners would refuse to admit USCC even if it asked to be admitted.

Mr. Naftalin further stated in that letter that the above information was furnished to Mr. Hill as counsel for the JHP Partnership so that he "may notify the FCC in accordance with its rules of the change in ownership." (Jt. Exh. 12.)[4]

18. On February 9, 1987, USCC offered and Messrs. Hashtroudi and Pelissier accepted, an Agreement to admit USCC as a general partner to the JHP Partnership, to reconstitute the partnership so that Messrs. Hashtroudi and Pelissier own 50.01% of the equity, and an option buy-out provision for USCC to obtain full ownership at a later date with the exercise of that option (or "put") running in favor of Messrs. Hashtroudi and Pelissier. (Stip. 26 and Jt. Exh. 15.)

19. On March 20, 1987, the following documents were executed by USCC and Messrs. Hashtroudi and Pelissier:

(a) Amended Partnership Agreement (Jt. Exh. 16).

(b) Secondary Security Agreement (Jt. Exh. 17).

(c) Management Agreement (Jt. Exh. 18).

(d) Letter regarding Amended and Restated Partnership Agreement of JHP Partnership (the "Side Letter") (Jt. Exh. 19).

(e) Assignment Of Contract Rights (Jt. Exh. 20).

(Stip. 26.)

20. Pursuant to the Management Agreement ("MA"), USCC constructed and continues to construct transmission facilities and provides management services for the JHP cellular system in the Manchester-Nashua New England Metropolitan County Area. (Stip. 27.) The MA identifies the JHP Partnership as a California general partnership and as the permittee granted the construction permit to construct and operate the non-wireline cellular mobile telephone service in the Manchester-Nashua service area. USCC is recognized as having relevant experience, and while the MA delegates substantial authority to USCC to construct and operate, such actions are

> subject to the approval of the partners of the permittee [Pelissier and Hashtroudi] in conformance with all applicable FCC rules and regulations.

(Jt. Exh. 18.) Even with the Agreement of February 9, 1987, wherein USCCNH was admitted as a general partner to the JHP Partnership, USCCNH had only one vote. Messrs. Hashtroudi and Pelissier have the other two controlling votes. (*See* Stip. 26 and Jt. Exh. 15, *supra.*) And under the MA, USCCNH is the agent of the JHP Partnership permittee which means that direction and control remain with the controlling principals, Hastroudi and Pelissier. In that regard, the MA specifically provides for prior approval by Hashtroudi and Pelissier of critical elements of the cellular transmission business including construction budget, operating budget, marketing plans, and rates and business plans to be offered to potential customers.

21. Successive Forms 430 were filed by the JHP Partnership on March 31, 1987, and on May 20, 1987, to report the essentials of the above developments. A meeting was held with the Bureau staff in July, 1987, to discuss these matters and the information furnished at that meeting was later supplemented by letter from JHP's counsel to the staff dated August 6, 1987. (Stip. 31 and Jt. Exh. 24.) That letter provided in pertinent part that Mr. Jenkins was originally identified as the "managing partner" to sign applications and coordinate Partnership matters through his home mailing address; that Mr. Jenkins had no added authority as a partner; that it was in December 1986 that Messrs. Hashtroudi and Pelissier, and their counsel Mr. Hill, were first notified of Jenkins' agreement to assign his interest - "a unilateral action by Mr. Jenkins, made without consultation or approval of the remaining JHP partners;" and that USCC did not receive any voting right or entry into the Partnership by virtue of Jenkins' assignment. (Jt. Exh. 24.) The letter goes on to recite that it was "subsequent" to the Jenkins assignment that USCC and the JHP Partnership began to negotiate for USCC's admission to the Partnership and that USCC was admitted under a Restated Partnership Agreement which continued to provide each partner, regardless of financial interest, with *one vote* in Partnership

affairs which means that two of the three partners continue to have the power to make Partnership decisions. (Jt. Exh. 24.)

22. The Amended Partnership Agreement was negotiated between USCC on the one hand, and JHP and Messrs. Hashtroudi and Pelissier on the other. During the period February 9, 1987 - March 20, 1987, several drafts of the agreement were exchanged among the negotiating parties. If called to testify in this proceeding, Messrs. Hill and Naftalin would testify that the intent of the Agreement was to effectuate the desires of Messrs. Hashtroudi and Pelissier to remain active participants in JHP. Mr. Hill would also testify that Messrs. Hashtroudi and Pelissier assumed that the market value of operating cellular systems would appreciate substantially over time. Mr. Hill would further testify that the put and call provisions and the annual option payments provided for in the Amended Partnership Agreement (Jt. Exh. 16) were designed to provide Messrs. Hashtroudi and Pelissier with the financial ability to continue to participate fully as partners in JHP up until 1994. (Stip. 32.)

23. Under the Amended Partnership Agreement, Messrs. Hashtroudi and Pelissier together have voting control and the Agreement provides that there can be no capital calls made without consent of two partners. (Jt. Exh. 16.) Since the admission of USCCNH as a partner, Messrs. Hashtroudi and Pelissier have attended all partnership meetings and have participated in all partnership decisions. (Jt. Motion at 10-11, n. 5.)

24. The present JHP partners, which include USCCNH, met formally for the first time on March 20, 1987, and they have continued to meet. Since March 20, 1987, all partnership meetings have been attended by Messrs. Hashtroudi, Pelissier and Hill, the latter serving as counsel to JHP. Messrs. Hashtroudi and Pelissier have participated in the making of partnership decisions and in directing the performance by USCCNH of its duties under the Management Agreement. Mr. Hill, as counsel to JHP, has kept Messrs. Hashtroudi and Pelissier advised of all significant partnership matters, and has at all times since the admission of USCCNH to JHP acted on their behalf as partners in all matters relating to JHP, including USCCNH's performance under the Management Agreement. Since March 20, 1987, neither USCCNH nor USCC has exercised authority over the affairs of JHP beyond that authority which is implicit in its participation as one of the three JHP partners in the case of USCCNH, or beyond that authority which is implicit in USCCNH's duties under the Management Agreement.

CONCLUSIONS OF LAW

25. The Commission's rules provide that in considering a motion for summary decision:

> The party filing the motion may not rest upon mere allegations of denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). As Joint Movants, all parties have the burden of establishing that summary decision would be appropriate based on the papers submitted. *See Summary Decision Procedures*, 34 F.C.C. 2d 485, 487-88 (1972). For reasons stated below, the parties are found to have sustained their burden.

26. It is concluded that there is not substantial evidence in the record which establishes that the respondents were not acting in good faith in accordance with the advice of experienced communications counsel and therefore it as further concluded that there has been no intentional violation of the Communications Act or the Commission's regulations concerning license transfers.

No Control Was Transferred Under The Uniform Partnership Act In November Or December 1986

27. The evidence, findings and conclusions referred to above establish that without notice to or authorization from his fellow partners, Mr. Jenkins, now deceased, agreed to transfer his 50% equity interest in the JHP Partnership on November 7, 1986, to USCC in consideration for a payment of $760,672. The Purchase Agreement (Jt. Exh. 6) was executory in that it agreed to sell in the future and the closing was to go forward on an indeterminate date and only after opinions were delivered and other conditions were met. Therefore, on November 7, 1986, USCC acquired no more than an executory contractual right to Jenkins' equity interest in the Partnership.

28. The Partnership Agreement of September 26, 1985, provides that each of the three partners would have "an equal responsibility for [and] will actively participate in, the management of the business of the Partnership." (Jt. Exh. 1.) Insofar as the Purchase Agreement is concerned, to which neither Mr. Hashtroudi nor Mr. Pelissier were parties, USCCNH did not acquire any right to vote on partnership business. Jenkins did not have the power to confer control on USCC. *See* Uniform Partnership Act ("UPA") §9(2):

> ***Section 9. Partner Agent of Partnership as to Partner-ship Business.***
>
> (2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the partners.

Here. the executory assignment of Jenkins' 50% equity interest to USCCNH was for the purpose of Jenkins receiving a substantial sum of money for himself. That agreement was not for the purpose of carrying on partnership business. Nor was it authorized by Hashtroudi or Pelissier. The evidence fails to show even any knowledge on the part of Hashtroudi or Pelissier at or before the assignment (Jt. Exh. 24.) There is reliable evidence indicating that immediately afterward they took steps to require the signature of two partners on all partnership documents and they expressed concern to Mr. Hill that JHP's business might have been adversely effected by Jenkins' assignment. (Jt. Exh. 10.) Thus, they acted responsibly to assure that Mr. Jenkins did not use his implied agency authority as a general partner in a manner that would be adverse to the Partnership's interest. That would include an unauthorized transfer of control. Also, the two partners turned down a similar offer which USCCNH made at or about the same time in November,

1986. (Jt. Exh. 9.) Thus, the evidence establishes that Jenkins acted without Partnership authorization and that no control was transferred on November 7, 1986, from the JHP Partnership-permittee to USCC. *See* UPA §9(3)(c) (unless authorized, one partner cannot do any act that would make it impossible to carry on the ordinary business of a partnership).

29. Furthermore, the 50% equity interest of Jenkins did not *per se* carry an attribute of control. The UPA defines a partner's interest in a partnership as "his share of the profits and surplus, and the same as personal property." UPA §26. Nor does the assignment of that partnership interest give the assignee any rights of control under the UPA:

> ***Section 27. Assignment of Partner's Interest***
>
> (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

UPA §27 [West's Anno. California Code §15027(1)]. Under that standard, an assignee such as USCC could not have acquired control under UPA or California partnership law over the cellular transmission business of JHP Partnership on November 7, 1986, by virtue of Jenkins entering into the Purchase Agreement, or on December 15, 1986, by virtue of the execution of the Assignment of Partnership Interest. The provisions of the California version of the UPA filed in this case support the above conclusions. *See* Memorandum Of Law filed on June 26, 1989, by Mr. Hill.

30. It is recognized that after executing the Purchase Agreement, on December 15, 1986, Jenkins executed an Assignment Of Partnership Interest (Jt. Exh. 11). That document clearly was executed by Jenkins in his individual capacity and it did not even purport to bind or effect the JHP Partnership. Accordingly, the same conclusion is reached with respect to the Assignment as was reached with respect to the Purchase Agreement. Under partnership law, the document did not transfer any control to USCCNH over the business decisions or operations of the JHP Partnership.

31. As a result of the conclusions made under Paras. 26 to 30, *supra*, the first issue is resolved in favor of the Joint Movants under the UPA and California partnership law. Accordingly, it is determined that under the facts of the Joint Stipulations in this case, control has not been shown to have passed to USCC under the transactions referenced in Stipulations numbered 18 and 23.

Transfer Of Negative Control Under FCC Regulations Is Doubtful And Becomes Moot by Settlement

32. Notwithstanding the conclusions reached above under principles of partnership law, the Commission's regulations specifically prohibit any direct or indirect transfer of control of a license without Commission approval and in that connection, "a change from less than 50% ownership to 50% ownership or more ownership shall always be considered a transfer of control."[5] *See* 47 C.F.R. §22.39(a)(1). That provision covers the case of "negative control" passing to remaining shareholders or partners when there is a withdrawal of a shareholder or partner. In this case, Jenkins intended to withdraw from the Partnership when he signed the Purchase Agreement on November 7, 1986, and he effectively withdrew from the Partnership when he assigned his interest on December 15, 1986, under the Assignment Of Partnership Interest. These facts establish that with respect to equity, Jenkins signed an executory agreement on November 7, 1986, to assign his 50% equity interest to USCC. That transaction did not transfer Jenkins' equity and so the Commission's rule was not adversely effected. But thereafter, Jenkins did effectively transfer his 50% equity interest on December 15, 1986, by the unequivocal language of the document. (Jt. Exh. 11.) If Hastroudi, Pelissier and the JHP Partnership were parties to that assignment, or if they had authorized it, there may have been a violation of Commission Rule 22.39(a)(1), *supra*. But the language of that rule does not specifically address an inadvertent or an unauthorized transfer of equity by one of three partners when the remaining two partners have thrust upon them the "negative control" that is outlawed under the rule. That is the case here under the evidence presented by the Bureau and the Respondents. The evidence indicates that Hashtroudi and Pelissier initially wanted nothing to do with Jenkins' assignment to USCC and in November 1986, they even turned down an offer made by USCC on similar terms to assign their own respective interests. (Jt. Exhs. 9 and 10.) There is no evidence of a scheme or device to unlawfully transfer "negative control" to Hashtroudi and Pelissier. And if that issue were to be pursued its outcome would be extremely doubtful because the testimony of Mr. Jenkins' would not be available.

Remedies and Sanctions

33. While the issue of negative control cannot be definitively resolved here, notwithstanding the doubts of its application under these circumstances, the issue becomes moot under the settlement whereby USCC agrees to divest a 0.10 percent interest in the JHP Partnership. By that remedy, there will have been less than 50% of JHP's equity transferred to USCC which makes the prohibition under Rules 23.39(a)(1), *supra*, inapplicable. On March 20, 1987, USCC became a partner and any perceived "negative control" residing in Messrs. Hashtroudi and Pelissier was then neutralized. Thus, there would be no need for a transfer of control application to be filed in view of this resolution of the case. And since there was no intent to transfer unlawfully, there is no basis for a license revocation.

34. It is concluded that the issues as framed by the parties are resolved in favor of the Respondents insofar as there has been no violation of the law found against them. However, the issue of transfer of "negative control" by virtue of the December 15, 1986, assignment is not completely resolved under this ruling. It is recognized

that an issue of control involves an issue of fact, the resolution of which depends on the circumstances presented. *Metromedia*, 98 F.C.C. 2d 300, 306 (1985). At best, this would be difficult to definitively accomplish without Jenkins' testimony. Also, the law is not abundantly clear. The Bureau contends that there may have been a technical transfer of negative control to Messrs. Hashtroudi and Pelissier by virtue of Jenkins' assignment on December 15, 1986, which "negative control" would have lasted until USCCNH was admitted as a partner to the JHP Partnership on March 20, 1987. If Hashtroudi and Pelissier had such negative control, it was never exercised in a way that caused harm to the public interest. It is acknowledged by all parties, and it is clear from the facts, that once USCCNH was admitted as a partner there was no longer any "negative control" by virtue of the percentages of equity ownership. As far as voting control is concerned, Messrs. Hashtroudi and Pelissier had voting control throughout the period under contention, i.e., from November 7, 1986 through March 20, 1987. Also, it is noted that under the terms of the Management Agreement under which USCCNH manages the Partnership's business affairs, approval of Messrs. Hashtroudi and Pelissier is required on all major decisions and control had not been surrendered to USCCNH. Thus, USCCNH was not vested as manager with the right to determine the licensee's policies and method of operation or to dominate Partnership affairs. *Compare News International*, 97 F.C.C. 2d 349, 355 (1984).

35. Because of the costs of litigation, the doubtful outcome of the transfer of control issue, and the uncertainty of proof in view of Jenkins' demise, it is found to be in the public interest to accept the settlement and since the alleged violation of §22.39(a)(1) is not resolved in favor of Respondents, the acceptance of a voluntary sanction is appropriate. The transfer by USCC of 0.10% equity to Hashtroudi and Pelissier is more remedial than it is punitive, such relief would be in the public interest and it will be granted under the settlement. However, as held above, the evidence does not support a finding that there was any intentional violation of the Communications Act or of the Commission's regulations and, therefore, there is no basis in this record for a revocation.

RULINGS

Accordingly, IT IS ORDERED that within fifteen (15) days of the release of this Decision, USCCNH SHALL CAUSE THE TRANSFER of a 0.05% equity interest in the JHP Partnership to Jalal Hashtroudi and a 0.05% equity interest in the JHP Partnership to Robert A. Pelissier in a form that is acceptable to the Common Carrier Bureau.

IT IS FURTHER ORDERED that within thirty (30) days of the release of this Decision, USCCNH SHALL PAY a penalty forfeiture to the Treasury of the United States of America in the amount of Ten Thousand Dollars ($10,000.00).

IT IS FURTHER ORDERED that the restrictions on transfer set by the Presiding Judge *pendente lite* ARE LIFTED and *Order*, FCC 88M-1978, released on June 27, 1988 IS VACATED.

IT IS FURTHER ORDERED that the Motion For Summary Decision filed by the Common Carrier Bureau on February 21, 1989, IS DISMISSED as moot.

IT IS FURTHER ORDERED that unless an appeal from this Decision is taken to the Commission, or unless the Commission reviews this Decision on its own motion in accordance with 47 C.F.R. §1.276 of the Commission's rules, this proceeding IS TERMINATED.[6]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] There recently has been an exception made with respect to a proposed transfer to new trustees of a parent entity. The ultimate transfer transaction is under review by the Bureau and so there was good cause shown for excluding that transaction from the stay order. *See Memorandum Opinion and Order*, FCC 89M-1716, released June 22, 1989.

[2] Since the above issues are resolved herein under the Joint Motion For Summary Decision and related Settlement, the Bureau's Motion For Summary Decision is dismissed as moot under this ruling.

[3] It is noted that the Joint Exhibits that were placed on the public record were to constitute the universe of the documents relied on for this ruling. The parties were not required to file documents for which a protective order would be sought if the documents placed on the public record were sufficient to support the Joint Motion. (*See* Conference of January 18, 1989, Tr. 86-90.) However, certain documents that were not included in the Joint Exhibits were also reviewed by the Presiding Judge in connection with this ruling. Those documents were ordered to be placed on the public record. *See Order*, FCC 89M-1763, issued June 28, 1989. These documents are: Jt. Exh. 8 (ltr. dtd. November 19, 1986, from Mr. Hill to Chief, Mobile Services Division, Common Carrier Bureau); Jt. Exh. 20 (Assignment of Contract Rights dtd. March 20, 1987); Jt. Exh. 22 (JHP Form 430 dtd. March 31, 1987); Jt. Exh. 23 (JHP Form 430 dtd. May 20, 1987). There were also additional documents submitted *in camera* that were not considered because of the evident applicability of the attorney-client privilege (Jt. Exh. 21) and work-product privilege (Jt. Exh. 25). Miscellaneous documents in the form of partnership minutes of meetings after March 20, 1987 (Jt. Exh. 26) and miscellaneous operational documents (Jt. Exh. 27) were rejected from consideration because they are only remotely relevant to the transfer issue and they would constitute a needless presentation of cumulative evidence which would create more confusion than clarification. *See* Rule 402 of the Federal Rules of Evidence. *See also* 47 C.F.R. §1.243(f) (authority of presiding officer to regulate course of hearing).

[4] The record also reflects a letter from counsel for a non-party to this case who disagreed with Mr. Naftalin's opinion. *See* letter dated December 18, 1986, from Mr. Louis Gurman to Mr. Naftalin on behalf of Cellular America, Inc. ("CAI"). Apparently, CAI wanted an opportunity to match USCC's offer to Jenkins and counsel raised questions about a right of first refusal under a settlement. He also raised the question of the legality of the transfer. (Jt. Exh. 13.) The letter is not offered as relevant evidence. The Bureau represents the public interest on the issue of transfer. The letter primarily raises questions concerning a private dispute which would not be appropriate to

address in this proceeding. *See Don H. Martin, Jr., et al.*, 4 F.C.C. Rcd 2707 (Review Bd 1989). That letter will not be considered in this decision.

[5] Counsel for respondents advance the theory that only a transfer of voting power such as the case of voting stock in a corporation would be prohibited. Counsel rely on the law in comparative broadcast cases. *See Anax Broadcasting, Inc.*, 87 F.C.C. 2d 483 (1981). But the Bureau would oppose application of the *Anax* doctrine to this cellular case. The issue of the application *vel non* of the *Anax* doctrine here is not addressed in this decision because it becomes moot under the settlement.

[6] This *Summary Decision* disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d) (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-250

In re Applications of

GLOBAL INFORMATION TECHNOLOGIES, INC.	File No. BPCT-861219KG
TEXSTAR COMMUNICATIONS, LTD.	File No. BPCT-870212KM
FRONTIER BROADCASTING, INC.	File No. BPCT-870212KN
FREDERICKSBURG CHANNEL 2	File No. BPCT-870212KP
HAL S. WIDSTEN	File No. BPCT-870212KT
STONEWALL BROADCASTING, INC.	File No. BPCT-870212KU

For a Construction Permit
For a New Television Station
Fredericksburg, Texas

Appearances

James F. Ireland, III, and *Robert G. Scott, Jr.*, on behalf of Global Information Technologies, Inc.; *Thomas A. Hart, Jr.*, and *Dan J. Alpert*, on behalf of TexStar Communications, Ltd.; *Robert Lewis Thompson*, on behalf of Frontier Broadcasting, Inc.; *Joel H. Levy*, and *J. Brian DeBoice*, on behalf of Fredericksburg Channel 2; *Jeffrey D. Southmayd*, and *Stephen C. Simpson*, on behalf of Hal S. Widsten; and *Merilyn M. Strailman*, and *Willard W. Pardue, Jr.*, on behalf of Stonewall Broadcasting, Inc.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD LUTON

Issued: June 29, 1989; Released: July 11, 1989

I. PRELIMINARY STATEMENT

1. The Commission designated for hearing 12 mutually exclusive applicants for a construction permit for a new VHF television station to serve Fredericksburg, Texas on Channel 2. *Hearing Designation Order*, MM Docket No. 87-250, DA 87-812 (released July 14, 1987) ("HDO"). Six applicants remain in this proceeding.

2. The HDO specified an issue:

> To determine, with respect to all of the applicants . . . whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

The Presiding Judge has resolved this issue in favor of all remaining applicants. *See Order*, FCC 87M-2375 (released September 30, 1987); *Order*, FCC 87M-2972 (released November 19, 1987); *Order*, FCC 87M-2971 (released November 19, 1987); *Order*, FCC 88M-412 (released February 17, 1988); *Order*, FCC 88M-413 (released February 17, 1988); *Order*, FCC 88M-2119 (released July 7, 1988).

3. The remaining issues designated in the HDO are:

> To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

4. By *Memorandum Opinion and Order*, FCC 87M-2654 (released October 23, 1987), the issues were enlarged against Frontier Broadcasting, Inc. (formerly Frontier Southwest Broadcasting, Inc.), as follows:

> To determine whether Frontier had reasonable assurance of the availability of its originally specified transmitter/antenna site at the time it filed its application.
>
> To determine whether, in light of the evidence adduced under the foregoing issue, Frontier falsely certified the availability of the site originally proposed in its application.
>
> To determine, in light of the evidence adduced under the foregoing, whether Frontier is qualified to hold a Commission license for a television station in Fredericksburg, Texas.

5. The hearing commenced on February 23, 1988. By *Order*, FCC 88M-2111 (released July 7, 1988), the record was closed and the parties were directed to submit proposed findings of fact and conclusions of law on August 31, 1988, with replies thereto due on September 15, 1988. The date for replies was subsequently extended until October 17, 1988.

II. FINDINGS OF FACT

Global Information Technologies, Inc.

6. Global Information Technologies, Inc. is a Texas corporation with one class of stock (voting). (Global Ex. 1). The ownership, officers, and directors of Global are as follows:

Saleem Tawil	President, Treasurer, Director; Owner of 50% of voting stock
Carmen T. Armistead	Vice President, Secretary, Director; Owner of 50% of voting stock

7. If Global's application is granted, Tawil will work at the station full-time (at least 40 hours per week) as a member of the station's Management Committee, and as the station's General Manager and Chief Engineer. (Global Ex. 2 at 1). Tawil expects to devote at least 40 hours per week to his management and supervisory roles. (Tr. 144). "Very little" of his time will be devoted to non-management duties. (Tr. 145-46). Tawil will terminate or reduce other employment or business commitments and civic activities as may be necessary for him to devote full-time to his duties at the station. (Global Ex. 2). Tawil states that in no event will he commit himself to more than 15 hours per week for outside activities. *Id.*

8. As General Manager, Tawil will perform the duties ordinarily associated with the position of General Manager of a TV station. (Global Ex. 2 at 2). Those duties will include supervising and directing the overall operation and administration of Global's station on a day-to-day basis, in accordance with the policies established by the Management Committee. *Id.* Tawil will be part of a team that decides which programs addressing local needs will be aired. (Tr. 128). He and Armistead will be involved in ascertaining the needs of Fredericksburg through involvement in Fredericksburg's civic affairs and direct communication with civic leaders. (Tr. 165).

9. As Chief Engineer, Tawil will supervise and direct the construction of the station and the technical operations of the station after construction. (Global Ex. 2 at 2). Part-time personnel will perform the tasks necessary for day-to-day maintenance, transmission, and other engineering duties at the station. (Tr. 59). Tawil will supervise these part-time personnel as needed, as part of his responsibility as Chief Engineer. (Tr. 59). In addition, Tawil will assist in the production of local programming. (Global Ex. 2 at 2). Tawil will have "secondary responsibility" over production of local commercials to ensure that the station's customers are satisfied with the service they are receiving. (Tr. 66). Two to three part-time employees will have primary responsibility for local production. (Tr. 93-94).

10. If Global's application is granted, Carmen Armistead, a female, will serve as a member of its proposed station's Management Committee and as Sales Manager for the station on a full-time basis. (Global Ex. 3 at 1). Armistead will terminate or reduce any other employment or business commitments she may have at that time and reduce her civic activities as necessary to devote herself to the station full-time. *Id.* Armistead states that in no event will she devote more than 15 hours per week to outside activities. *Id.*

11. As Sales Manager Armistead will be responsible for overseeing the station's sales staff and implementing the sales, promotion, and publicity plans and policies established by the Management Committee. *Id.* at 2. The station will have one salesperson that she will supervise. (Tr. 173, 188). She will supervise the salesperson and also assist that person by checking on the availability of production facilities and scheduling time (trafficking). (Tr. 177, 190). As part of her responsibilities in promotion and publicity, she will personally organize social events and prepare announcements to the community. (Tr. 174-75). She will also be responsible for contacting the newspapers for publicity with regard to Channel 2. (Tr. 175). She anticipates that she will devote 10 hours per week to promotion and publicity. (Tr. 188). She will also assist in outside production in instances where there is an event to be covered. (Tr. 178, 195). She will devote 5-10 hours per week performing engineering functions on a secondary basis. (Tr. 188). She will occasionally work in master control and engage in engineering technical activities. (Tr. 212).

12. The Management Committee of the station will be composed of Tawil and Armistead, and will be responsible for establishing all station plans and policies including personnel, administration, finance, sales, promotion and publicity, public affairs, programming and technical operations. (Global Ex. 2 at 1; Ex. 3 at 1). The Management Committee will be responsible for implementing the plans and policies concerning personnel, finance, public affairs, and programming. (Global Ex. 2 at 1-2; Ex. 3 at 1). At the beginning, the Management Committee will meet almost daily "for an hour or so," 5-10 hours per week. (Tr. 143, 192).

13. Carmen T. Armistead lives in Austin, Texas, outside the Grade B contour proposed by Global. (Global Ex. 3 at 2). In the event Global's application is granted, Armistead will establish her residence in Fredericksburg, Texas. (Global Ex. 3 at 2). Saleem Tawil also lives in Austin, Texas, outside the Grade B contour proposed by Global. (Global Ex. 2 at 2). In the event Global's application is granted, Tawil will establish his residence in Fredericksburg, Texas. (Global Ex. 2 at 2).

14. Tawil was employed full-time at Station KZTV-TV, Corpus Christi, Texas from September-November 1966 as a broadcast engineer. (Global Ex. 2 at 3). Tawil was also employed at Station KIII-TV, Corpus Christi, Texas from November 1966 to February 1967 as a broadcast engineer and later, from June 1968 to May 1971, as Assistant Chief Engineer. (Global Ex. 2 at 3; Tr. 68-70). He also supervised the construction and start-up of Station KXIY-TV, Victoria, Texas during 1969. He was employed part-time at Station KLRN-TV, Austin, Texas from June 1971 to May 1973 and October 1974 to May 1975 as a broadcast engineer. (Global Ex. 2 at 3; Tr. 71-72).

15. Ms. Armistead has worked as a communications engineer in two related consulting engineering firms since September 1984. (Global Ex. 3). Between September 1984 and August 1987, she provided engineering services for Communications Carrier, Inc. There, she was engaged in producing broadcast feeds for satellite transmission, and produced various two-way press conferences and teleconferences live and on a taped delayed basis. From February 1985 to the present, Ms. Armistead has provided consulting engineering services for Diversified Communications Engineering, Inc. ("DCE"). With DCE, Ms. Armistead has provided a broad range of consulting engineering services to parties interested in planning, constructing and operating communications facilities. Approximately 20 to 25% of her engineering work for DCE is related to broadcast engineering. (Tr. 171).

16. Neither Global nor its principals own or have any attributable interest in any medium of mass communications. (Global Ex. 4).

TexStar Communications, Ltd.

17. The application of TexStar Communications, Ltd., was originally filed with the Commission on February 12, 1987 by Lesvia Guerra-Cox, as a sole applicant and in her name only. (Tr. 300-01). She first met Hector Pedregon in late January 1987, and after various meetings, on April 6, 1987 the two of them formed a general partnership called TexStar Communications. (Tr. 322-23). On April 7, 1987, the B cut-off date in this proceeding, the application was amended to make the applicant TexStar Communications, the general partnership Guerra-Cox and Pedregon had formed the prior day. Guerra-Cox was a 60% equity general partner, and Pedregon held the remaining 40% as a general partner. (TexStar Ex. 1 at 2).

18. Guerra-Cox had various meetings with other persons who might become limited partners in the venture. These meetings started as early as March of 1987 and proceeded through the formation of TexStar Communications, Ltd. (the current applicant) on December 23, 1987. (Tr. 324; TexStar Ex. 2, Att. A).

19. TexStar Communications, Ltd. is composed of the following individuals and entities: the general partner of the limited partnership is TexStar Communications, the joint venture general partnership formed by Guerra-Cox and Pedregon on April 6, 1987. TexStar Communications holds 100% of the voting power and 75% of the equity of TexStar Communications, Ltd.; 25% of the equity is held by a limited partner, L.H. Adams Investment, Inc. The sole stockholder of that corporation is Dr. Larry H. Adams.

20. TexStar's Limited Partnership Agreement was executed December 23, 1987. It identifies "TexStar Communications" as the "General Partner" and provides, at Section 9.3, as follows:

> Decisions of the General Partner shall be by unanimous consent or vote of the General Partner.

21. In prehearing testimony elicited at their depositions, Guerra-Cox and Pedregon explained how they expect their partnership to function:

> Q. Have you discussed with Mr. Pedregon what will happen if the two of you can't agree upon a matter?
>
> A. (Ms. Guerra-Cox) No, because we have reached an understanding that all of our decisions will be made by unanimous consent. (FC2 Ex. 6).

Mr. Pedregon testified that, "Well, I can't make any decisions for the partnership by myself," because "[i]t takes a unanimous agreement between Mrs. Cox and myself." (FC2 Ex. 9).

22. With reference to Section 9.3 of the Limited Partnership Agreement, Ms. Guerra-Cox stated:

> "It just stipulates that our decisions will be reached by unanimous consent. Neither one or the other one of us wants to be able to have the responsibility of going out and making a major decision without consultation of the other one. So, its a protection factor for the both of us." (FC2 Ex. 6).

23. According to Mr. Pedregon's testimony at deposition, he and Guerra-Cox agreed that "our agreement would proceed . . . by unanimous decision." (FC2 Ex. 10).

24. On February 11, 1988, Fredericksburg Channel 2 filed a motion seeking to have TexStar's application dismissed, claiming that Section 9.3 of the Limited Partnership Agreement nullified the voting structure set forth in the earlier general partnership agreement, i.e., 60% Guerra-Cox, and 40% Pedregon, and substituted in its place a new voting structure in which Guerra-Cox and Pedregon each had a 50% voting interest.[1]

25. After the filing of Fredericksburg Channel 2's motion, Guerra-Cox offered the following explanation at hearing:

> " . . . If we have a vote, I pick 60 percent, Mr. Pedregon picks 40 percent; my percentage overrides Mr. Pedregon's; that percent becomes the unanimous vote of TexStar Communications." (Tr. 437).

26. Mr. Pedregon offered the following at hearing:

> "We discussed the fact that under those certain provisions we would need a unanimous consent. She agreed. No big deal. We have a wonderful relationship. Why should we dwell on it?" (Tr. 604).

27. On April 6, 1987, Mr. Pedregon and Ms. Guerra-Cox executed FC2 Ex. 7, TexStar Communications general partnership agreement. After the "B" cut-off date of April 7, 1987, while discussing the Limited Partnership Agreement in the office of Mr. Pedregon's attorney, Mr. David Jackson, the principals of TexStar reached their "understanding" concerning the requirement for unanimity. (Tr. 603).

28. The Limited Partnership Agreement specifically provides in Section 9.10 that "the General Partner shall not communicate or attempt to communicate with the Limited Partner on matters pertaining to the day-to-day affairs of the partnership's business." (TexStar Ex. 1, Att. A at 9). No provision of the Limited Partnership Agreement prevents the Limited Partner from communicating or attempting to communicate with the General Partner on the day-to-day affairs of the partnership.

29. Lesvia Guerra-Cox will serve full-time as General Manager of TexStar's station, and she will work a minimum of 40 hours per week in that position. (TexStar Ex. 2 at 2). As General Manager, she will oversee the construction and operation of the station and will direct its overall operations. The programming, administration, and promotional components of the station's operations will be under her supervision. She will terminate her current employment as marketing and special events consultant to the Antonio Festival, or any other contracted employment, in order to effectuate her commitment.

30. Hector Pedregon will serve as Business Manager of the proposed station, and will work a minimum of 40 hours per week in that capacity. (TexStar Ex. 3 at 2). As Business Manager, he will oversee the business affairs of the station, including establishing budgets, overseeing the station's billings, billing practices and cash flow of the station, and monitoring the station's sales, accounting, and trafficking departments. (Tr. 651-52). He will terminate

his current employment as manager of The Peach Tree Gift Gallery in Fredericksburg, Texas in order to effectuate this commitment. (TexStar Ex. 3 at 2, 3.)

31. Lesvia Guerra-Cox is Hispanic. (TexStar Ex. 2 at 3; Tr. 289). All four of her grandparents were born in Mexico. (Tr. 563).

32. Hector Pedregon is also Hispanic. (TexStar Ex. 3 at 2). Mr. Pedregon's ancestors originated in Mexico and Spain. (Tr. 646-47).

33. Lesvia Guerra-Cox currently resides in San Antonio, Texas, 96.9 kilometers (60.21 miles) from the center of Fredericksburg, within the Grade B contour of TexStar's proposed station. (TexStar Ex. 5, Tables 2-3; Ex. 2 at 3). She has resided within the Grade B contour since 1983. She also previously resided within the proposed Grade B contour in 1967-68. (Tr. 264). Ms. Guerra-Cox will move to Fredericksburg upon grant of TexStar's application. (TexStar Ex. 2 at 3).

34. Hector Pedregon resides directly within the city limits of Fredericksburg, Texas. (TexStar Ex. 5, Table 2). He has resided in Fredericksburg, Texas since 1968. (TexStar Ex. 3 at 2). He will continue to reside in Fredericksburg, Texas upon grant of TexStar's application.

35. Lesvia Guerra-Cox is female. (TexStar Ex. 2 at 3).

36. Mr. Pedregon is in his second year on the Board of Directors for the Texas Retailers' Association, a state-wide organization to which he was elected in January 1987. (TexStar Ex. 3 at 3). His term expires in 1989.

37. Mr. Pedregon is a founding member of the Fredericksburg Shopkeepers' Guild, and he served as President of the Guild in 1983 and Treasurer in 1984. (TexStar Ex. 3 at 3). This Guild was organized in 1979 for the sole purpose of promoting and advertising Fredericksburg as a tourist attraction.

38. Mr. Pedregon was appointed to and participated in the Hill Country Community Needs Council from 1983 through 1985. (TexStar Ex. 3 at 4). The Council was organized for the purpose of helping the needy and aged in the Fredericksburg community in the area of medical assistance, counseling, transportation, home care, and hospice.

39. In 1983, Mr. Pedregon helped form and joined the Hill Country Youth for Christ. (TexStar Ex. 3 at 4). He continues to be a member of that organization and presently holds a position on the Board of Directors as Vice President. *Id.*

40. He is a member of the Gillespie County Historical Society. (TexStar Ex. 3 at 4). He is a life member of the Society and was appointed to its Board of Directors in 1979 for a three-year term.

41. In 1974, Mr. Pedregon, with a group of interested individuals and businessmen in the community, organized the Fredericksburg Heritage Federation for the sole purpose of raising funds to go to the restoration and preservation of historic buildings in Fredericksburg. (TexStar Ex. 3 at 5). Fredericksburg consists of an historic area that dates back to 1836 when the city was founded. This organization ensures the preservation of those historic buildings.

42. In 1971, Mr. Pedregon was elected to the Board of Directors of the Fredericksburg Chamber of Commerce. (TexStar Ex. 5 at 5). The function of the Chamber of Commerce is to promote Fredericksburg through tourism, business, and commercial activities.

43. In 1968, Mr. Pedregon became a member of the Fredericksburg Jaycees and continued as a member from 1968 to 1971. (TexStar Ex. 3 at 6).

44. Mr. Pedregon was a member of the Rotary Club of Fredericksburg, Texas from 1968 through 1971. (TexStar Ex. 3 at 6).

45. From May 1980 to May 1983, Mr. Pedregon served as a member of the Planning and Zoning Commission for the City of Fredericksburg. He was appointed to that position by the city government.

46. In about June 1981, Mr. Pedregon was appointed to the Historic Review Board. (TexStar Ex. 3 at 7). The organization's responsibility is to review all the applications for changes of any type affecting the buildings and properties located in the Historic District of Fredericksburg. His term as a Board member expired in the Summer of 1988.

47. Mr. Pedregon was formerly a member of St. Barnabas Episcopal Church. He participated on two vestries from 1969 to 1970 and from 1976 to 1978. (TexStar Ex. 3 at 7-8).

48. At the present time, he is the Sunday School teacher for the junior high school boys at Grace Bible Chapel, Kerrville, Texas, where his family maintains its present church membership.

49. From March 1987 to the present, Ms. Guerra-Cox has been an Advisory Board Member of the Financial Committee for the Missionary Catechists of Divine Providence ("MCDP"), a locally based organization of Catholic nuns. (TexStar Ex. 2 at 5; Tr. 278).

50. Ms. Guerra-Cox served as Co-Chairman of the Papal Hospitality Committee of San Antonio from September 1986 to September 1987. (TexStar Ex. 2 at 5).

51. From 1984 to 1986, Ms. Guerra-Cox was actively involved in Hispanas Unidas as a volunteer speaker and moderator. (TexStar Ex. 2 at 6). The organization provides information and services to serve the Hispanic community and exposes young Hispanic women to various available career possibilities.

52. Ms. Guerra-Cox served as a Publicity Consultant to the Coalition for Children, Youth and Families ("CARES") from 1983 to 1985. (TexStar Ex. 2 at 6). CARES is a United Way organization which educates and informs the community on child abuse.

53. Ms. Guerra-Cox has been involved in distributing Christmas gifts to needy children through the Elf Louise Program (1985 to 1986). (TexStar Ex. 2 at 7; Tr. 285-86). She also worked on marketing and public relations for the Children's Hospital while an employee at WMOL-TV (Channel 4) from 1983 through October 1984, and on a volunteer basis thereafter from October 1984 through June 1985. (Tr. 286-88; TexStar Ex. 2 at 7). She has provided public relations and promotional guidance to the Battered Women's Shelter of Bexar County from January 1988 to the present. (TexStar Ex. 2 at 7).

54. From March 1983 through July 1983, Lesvia Guerra-Cox worked for the Southwest Texas Public Broadcasting Council, licensee of stations KLRN(TV) (PBS), San Antonio, Texas, and KLRU-TV (PBS), Austin, Texas. (TexStar Ex. 2 at 4). She was Director of Public Information for the stations, and her duties included responsibility for the local promotion and publicity of programming for the stations. (*Id.* at 4-5; Tr. 274).

55. From July 1983 through October 1984, Ms. Guerra-Cox worked for United Television, Inc., licensee of KMOL-TV Channel 4, which is licensed to San Antonio, Texas. (TexStar Ex. 2 at 4). She was the Director of Marketing, Advertising and Promoting.

56. From 1985 to 1986, Ms. Guerra-Cox was Marketing Director of the Sesquicentennial Committee - City of San Antonio. (TexStar Ex. 2 at 3). Ms. Guerra-Cox' responsibilities included conceptualizing and implementing various Sesquicentennial events throughout the year, organizing volunteers, coordinating with various city departments, and writing and compiling brochures. Among other things, she was responsible for working with various broadcast network affiliates to make them aware of city regulation (Tr. 268), and assisted in the the preparation of a documentary which was a "comprehensive look" at the Sesquicentennial Year. (Tr. 268-69). She also worked with various radio stations, writing and preparing PSAs. (Tr. 269-70).

57. During 1986 Ms. Guerra-Cox did volunteer work for the Department of Human Resources, City of San Antonio. (TexStar Ex. 2 at 3). She specifically worked with the Child Abuse Prevention Programs. Her responsibilities included writing brochures and PSA spots, and consulting, writing, and assisting in the production of two, one-half minute segments on child parenting and child abuse prevention for the local government access channel, utilizing the facilities of the local cable television franchise. (*Id.* at 3-4; Tr. 270-72).

58. From 1984 to 1985 Ms. Guerra-Cox served as the Marketing Specialist and Assistant Director of the Office of International Relations, Mayor's Office, City of San Antonio, Texas. (TexStar Ex. 2 at 4). In that capacity, she handled marketing, press releases, staged seminars, scheduled appropriate meetings with foreign visitors, and did promotional and economic development work to attract international business. Her duties included the scripting of PSAs for Mayor Cisneros that were broadcast on the network affiliates. (Tr. 272-73).

59. Neither TexStar, nor any of its principals, have any interest in any medium of mass communications. (TexStar Ex. 1 at 3; Ex. 2 at 7; Ex. 3 at 8).

Frontier Broadcasting, Inc.

60. Frontier Broadcasting, Inc. is a Texas corporation with 26 voting shareholders. (Future Ex. 1). Mitchell Johnson is the Secretary-Treasurer and *de facto* managing officer of Frontier. (Tr. 961).

61. Frontier holds the following construction permits:

W35AJ, St. Petersburg, FL

W20AF, New Orleans, LA

W63BB, Atlanta, GA

W39AT, Baton Rouge, LA

K55EK, Little Rock, AR

K55EN, Austin, TX

62. Oliver S. Heard, Jr. is a 16.57% non-voting stockholder individually and his law partnership is a 33.14% non-voting stockholder in San Antonio Video Corporation (SAVC), an applicant for Channel 60, San Antonio. A request to dismiss SAVC's application, as part of a proposed settlement of that proceeding, is pending before the FCC. Heard also owns approximately 2,500 shares of common stock of Clear Channel Communications, Inc. licensee of WOAI and KAJA(FM), San Antonio, Texas; KALO(AM) and KHYS(FM), Port Arthur, Texas; KAKC(AM) and KMOD(FM), Tulsa, Oklahoma; KTAM and KORA(FM), Bryan, Texas; and KPEZ(FM) in Austin, Texas. Clear Channel is the parent and 100% owner of Broad Street Communications Corp., licensee of WQUE(AM & FM), New Orleans; KTOK(AM) and KJYO(FM), Oklahoma City; WELI(AM), New Haven, Connecticut; WHAS and WAMZ(FM), Louisville, Kentucky. Clear Channel is also a licensee of K28AK, a low power TV station at Bryan-College Station, Texas, and has CP's for LPTV stations at Corpus Christi, Texas, San Antonio, Texas, Oklahoma City, Oklahoma, and Waco, Texas. Clear Channel has more than 3,000,000 shares of common stock outstanding. (Tr. 960). Heard is neither an officer or director of Clear Channel.

63. Frontier does not propose that any of its shareholders will be integrated into the management of its proposed station.

Site Issues

64. Frontier's Secretary-Treasurer Mitchell Johnson testified on Frontier's behalf concerning the site availability and false certification issues specified against Frontier. (Tr. 961). Johnson is the Frontier principal who was responsible for ascertaining whether reasonable assurance of the availability of Frontier's original transmitter site existed, and he signed the February 10, 1987 certification of the site's availability contained in Frontier's application. (Tr. 961, 1018; TexStar Ex. 15).

65. The site in question is owned by one Mr. Honig and was specified by Global as its proposed transmitter site in the Global application, the first application filed for Channel 2 in Fredericksburg. (Tr. 960, 965, 969). In Frontier's application filed February 12, 1987, Frontier specified that it too would use the Honig land previously specified by Global. (Tr. 965-71, 1018). The Frontier application contained a certification dated February 10, 1987 and signed by Mitchell Johnson representing that Frontier had reasonable assurance of the availability of the Honig site. (Tr. 1018-18; TexStar Ex. 15).

66. In seeking to obtain reasonable assurance of the availability of the site, Johnson placed a number of telephone calls in an effort to determine who the owner of the Global site was, culminating in a telephone call which Johnson placed to Honig himself on February 11, 1987, at 4:39 p.m., Central time. (Tr. 971, 973, 985, 997-98, 1014, 1030; TexStar Ex. 13). At the time Johnson placed the February 11, 1987 telephone call to Honig, the engineering for Frontier's application specifying the Honig site was completed, and the deadline for filing Frontier's application, February 12, 1987, was one day away. (Tr. 971, 981, 997-98, 1021). Johnson engaged in a "short" telephone conversation with Honig, which telephone records indicate lasted approximately three minutes. (Tr. 997-99). In this conversation, Johnson told Honig that Frontier was interested in leasing or purchasing the land in question for its proposed station, and Honig responded that the property was "spoken for," an apparent reference to the fact that Global had previously arranged with Honig to specify the site in its application. (Tr. 1000-02). Johnson explained to Honig that Frontier was confident of victory in this comparative proceeding and suggested that Honig could give Frontier the same site assurance as he

had earlier given Global (Tr. 1004). Johnson understood Honig to give his assent, conditioned on their "talk[ing] about it next year in terms of details." (Tr. 1006, 1007).

67. During the short conversation with Honig, there was no discussion of any terms of a prospective purchase or lease of the site by Frontier, including price, tower size, tower type, access to the site or the availability of electricity to the site. (Tr. 1009-10). Johnson testified that he assumed Frontier would be able to obtain the same "deal" with Honig which Global had obtained, but he admitted that he did not know what the nature of that "deal" was. (Tr. 1010-12). Johnson also testified that he assumed he would be able to obtain the site for a fair market price. (Tr. 1012). Neither Johnson nor any other Frontier principal or agent contacted Global to determine the nature of its arrangement with Honig, and Johnson had no further communication with Honig concerning the site either before or after Frontier certified its availability in its application. (Tr. 1028, 1034).

68. Johnson admitted that he had not spoken with Honig as of February 10, 1987, the date which Frontier's site certification bears. (Tr. 1030). Johnson stated that the date was a "mistake." (Tr. 1037). The Frontier certification of site availability also identifies Honig as the "agent" for the owner of the property, whereas Honig was in fact the owner of the property. (Tr. 1019, 1035; TexStar Ex. 15). Johnson said that this was also a "mistake." (Tr. 1019, 1035).

69. Johnson has substantial experience in obtaining what he considers to be "reasonable assurance" of the availability of proposed transmitter sites, having undertaken the process of certifying site availability in connection with approximately 70 previous applications before the FCC. (Tr. 974, 1032). He testified that his personal test for determining whether reasonable assurance exists is whether he feels "confident" that he can obtain the site for use. (Tr. 974-75).

Fredericksburg Channel 2

70. Fredericksburg Channel 2 is a limited partnership organized under Texas law. (FC2 Ex. 1 at 1). Its sole general partner, Bob A. Roth, owns 20% of the equity of the partnership, and its sole limited partner, B.J. "Red" McCombs, owns 80% of the equity of the partnership.

71. Mr. Roth will be the full-time general manager of FC2's proposed station. (FC2 Ex. 1 at 1). Roth will work a minimum of 40 hours per week at the station. As General Manager, Roth will supervise construction of the station, the hiring of all personnel, the placing of the station on the air, and the ongoing operation of the station. Roth will set station policies and have final responsibility for all aspects of station operations.

72. In 1946, after completing his military service, Roth commenced work full-time at an AM radio station in San Antonio as a commissioned time salesman and, later, as sales manager. (Id. at 4). In approximately 1948, Roth's father obtained a license for an FM station in San Antonio. Roth served as its sales manager. During this period, Roth directed the sales activities of both the AM and FM stations, represented the stations in local community organizations, and participated with his father in decisions concerning program format, engineering matters and station upgrades.

73. In the 1950's, Roth, his father, and a group of local investors which Roth put together applied for and obtained from the FCC, in 1956, a license for television station KONO-TV, Channel 12, San Antonio. As the President of KONO-TV's licensee, Roth had final responsibility for directing the station's affairs. Roth's 12-year tenure at KONO-TV ended in 1968, when he sold the station. (FC2 Ex. 1).

74. Between 1977 and 1985, Roth served on the Board of Trustees of the Southwest Texas Public Broadcasting Council, the licensee of noncommercial stations KLRN-TV, San Antonio, and KLRU-TV, Austin, Texas.

75. Roth is currently part owner and operator of a low power television station which transmits on Channel 2 in San Antonio.

76. Except for his period of military service during World War II, Roth has resided from 1922 to the present in San Antonio, Texas, at locations within the Grade B contour of FC2's proposed station. (FC2 Ex. 1 at 2-3).

77. Roth's local civic activities include the following:

Board of the Directors of the San Antonio Chamber of Commerce, Member, 1957-present

Advertising Federation of America National Board of Directors, Member, 1957-58

San Antonio Chapter of the United Way Campaign, Board of Directors 1952-1958

Board of the Ecumenical Center for Religion and Health, Founding Member, 1967-1974

Temple Beth-El, Member of the Board, 1959-present

Urban Renewal Agency of San Antonio, Member of the Board of Commissioners, 1966-1973

San Antonio Committee for Desegregation, Member, 1967

Executive Committee of HemisFair, 1968

San Antonio Bicentennial Committee, Member and Vice Chairman, 1971-1974

San Antonio Joint Airport Zoning Board, Member, 1961-1967

Saint Mary's University, Member of the Board of Trustees, 1960-1963

San Antonio Symphony Society, Member of the Board of Directors, 1966-1967

Southwest Research Foundation, Member of the Board of Directors, 1967-1969

Citizens' Building Committee of the Northeast Independent School District, Chairman, 1958

Baptist Memorial Hospital, Member of the Advisory Board, 1968-1969

Jewish Federation of San Antonio, General Campaign Chairman, 1986.

National Jewish Center for Immunology and Respiratory Medicine Annual Dinner, Treasurer, 1987

78. Fredericksburg Channel 2 has no other media interest. (FC2 Ex. 1 at 23). Bob Roth is President and 20% stockholder of San Antonio Channel 2 permittee of low power television station KO2MX, Channel 2, San Antonio, Texas. Fredericksburg Channel 2 claims that if it

receives a construction permit in this proceeding, station KO2MX will be taken off the air on or before the date on which FC2's full power station commences operations.

Hal S. Widsten

79. Hal S. Widsten is an individual applicant. He seeks credit for his claimed intention to move to Fredericksburg, Texas, and work full-time as the General Manager of his proposed Fredericksburg station in the event of a grant of his application. (Widsten Ex. 1 at 4; Tr. 1059). Prior to filing his application in this proceeding on February 12, 1987, Widsten filed with the FCC, on October 2, 1986, an application in which he sought as an individual applicant a construction permit for a new FM station at Oro Valley, Arizona. (Tr. 1044-45). In his Oro Valley FM application, Widsten proposed to move to Oro Valley and to serve as the full-time General Manager of his proposed FM station. (Tr. 1045-47; FC2 Ex. 12; Tr. 1048). Widsten submitted a written full-time integration proposal in this proceeding on October 8, 1987, and he testified that he has intended to be integrated full-time at his Fredericksburg station from the day he filed his Fredericksburg application on February 12, 1987, but he neither acted himself nor asked his counsel to take action to amend, alter or retract his full-time Oro Valley integration proposal at any time between its filing in October of 1986 and the date of his deposition in this proceeding in January of 1988. (Tr. 1048, 1051, 1059). Only after his January 1988 deposition did Widsten act to amend and retract his Oro Valley integration proposal. (Tr. 1049-50).

80. Widsten's Oro Valley integration proposal and his integration proposal in this proceeding were mutually inconsistent in that Widsten could not practically or physically both move to Oro Valley, Arizona and work full-time there and also move to Fredericksburg, Texas and work full-time there. (Tr. 1052).

81. In seeking to explain why he prosecuted before the FCC two conflicting full-time integration proposals, Widsten initially claimed that he had "forgotten exactly" what he had said in the Oro Valley application at the time he filed his application in this proceeding and that his failure to retract the Oro Valley integration proposal was a "mistake." (Tr. 1052). Widsten stated that his intent from the day he filed his application in this proceeding, February 12, 1987, was to move to Fredericksburg, Texas, and work as the full-time General Manager of his proposed television station, and claimed that he had simply "forgotten about" the conflicting Oro Valley commitment at the time he filed his Fredericksburg application. (Tr. 1051-53). Widsten further claimed that he didn't consciously think about the Oro Valley integration commitment at the time he filed the Fredericksburg application. (Tr. 1053).

82. After giving this testimony, Widsten was confronted with contradictory testimony which he gave during his deposition in this proceeding. (Tr. 1054-56). In that testimony, Widsten was specifically asked if he had actually thought about the Oro Valley integration commitment at the time he filed his Fredericksburg application, and he answered "Oh, yes, absolutely." (Tr. 1054). Widsten was also asked during the deposition, "When you filed your Fredericksburg application, you thought to yourself, well, this means the Oro Valley integration proposal is now contingent?" Widsten testified in response, "I have to tell you, . . . that, yes, I did." *Id.* At hearing, Widsten could offer no explanation for his contradictory testimony beyond the mere claim that he had had "trouble communicating" during the deposition. (Tr. 1054). Widsten admitted, however, that his deposition testimony was correct and that he did actually recall and consider the Oro Valley proposal when he filed his Fredericksburg application. (Tr. 1058).

83. Widsten also claimed at hearing that his failure to amend the Oro Valley integration proposal when his Fredericksburg application was filed was due to his "confusion" concerning whether he had proposed to divest his Oro Valley "situation" in his Fredericksburg application, and he said he "guessed" that he had believed at the time that something had been included in his Fredericksburg application indicating that he would divest his interest in Oro Valley. (Tr. 1057-60). Widsten was unable to provide any explanation for how such "confusion" could have arisen in his mind, but he maintained that he had intended to pursue the Fredericksburg integration proposal, and not the Oro Valley integration proposal, at all times subsequent to the February 12, 1987 date of the filing of his Fredericksburg application. (Tr. 1051, 1060-63).

84. After giving this testimony, Widsten was confronted with portions of his January 1988 deposition testimony in which he was asked the following questions and gave the following answers:

> Q: Do you intend to move to Oro Valley and to work full time if you are fortunate enough to secure that construction permit?
>
> A: As I indicate on the application, I would. Yes.
>
> * * *
>
> Q: Have you ever, Mr. Widsten, including at any time up to the present moment, had an intention to work full time at the Oro Valley station if you secure that construction permit?
>
> A: Yes.
>
> Q: When have you had that intention?
>
> A: Well, I had that intention at the time that I filed the application and to the present time, I would say that I have had that intention.

(Tr. 1063-66). Widsten thus testified during his deposition that he intended as late as January of 1988 to honor his Oro Valley integration commitment, and he could offer no explanation for the inconsistency between that testimony and his testimony at hearing. (Tr. 1064-66).

85. Widsten's broadcast experience includes the following positions: KSAQ-FM, San Antonio, Texas, 1983-1986, part-owner and general manager; WMBD-WKZW-FM, Peoria, Illinois, 1980-1983, station manager; self-employed as management/programming consultant, 1977-1980; KIMN-AM, Denver, Colorado, 1976-1977, program director; Frank Magid Associates, 1975-1976, director of radio marketing services and radio consultant; King Audio Productions, 1974-1975, manager of audio production arm of King Broadcasting; KING-AM, Seattle, Washington,

1972-1974, program director; KGW-AM, Portland, Oregon, 1969-1972, program director; WLS-AM, Chicago, Illinois, 1968-1969, production director; WKYC-AM, Cleveland, Ohio, 1967-1968, production director; KOIL-AM, Omaha, Nebraska, 1966-1967, on-air talent production director and news person; KRCB-AM, Council Bluffs, Iowa, 1965-1966, on-air talent, salesperson, production direction. (Widsten Ex. 1 at 1-2).

86. Widsten has resided in San Antonio, Texas, within the Grade B contour of his proposed station since August of 1983. (Widsten Ex. 1 at 1). During his residence in San Antonio, Widsten has been a member of a parent teacher association, a high school booster club, the Lutheran Church, the San Antonio Chamber of Commerce, the National Association of Broadcasters, the North Side San Antonio Chamber of Commerce, the San Antonio Conservation Society, the Texas Advisory Council for Community Education Association, and the Texas Association of Broadcasters. (Widsten Ex. 1 at 2-3). Widsten is also an advisory member of the Board of Directors of Keep San Antonio & Bexar County Clean & Beautiful, Inc. and was sponsor of the Target Ninety Goals for San Antonio "Adopt a School Program" with Lee High School. *Id.* Widsten has also participated in the following events: "Photon Q 96 Air Personalities vs. San Antonio"; "Saint Mary's Block Party"; "Be True to Your School" aluminum can drive; "Rey Feo Drive"; "Celebrity Waiters Gala"; "Halloween Haunted House"; "Market Square 4th of July Celebration"; "Taste of New Orleans" celebration to benefit the San Antonio Zulu Association; "World's Largest Coca-Cola Float"; "Valentine's Day Benefit"; and "Cinco De Mayo". (Widsten Ex. 1 at 3-4).

Stonewall Broadcasting, Inc.

87. Stonewall is incorporated under the laws of the State of Texas. It has both voting and non-voting common stock. The three voting shareholders are Robert N. Simmons, Marian R. Nixon, and Marquis E. Whittington. Each of them owns 100 shares, or one-third, of Stonewall's voting stock. (Stonewall Ex. 1). Together, they own 30% of the total equity. Stonewall's non-voting shareholder is Rebecca F. Lambert; she holds 100 shares of stock.

88. The three voting shareholders propose to be integrated full-time into management of Channel 2. Mr. Whittington is proposed as the General Manager for Channel 2, Ms. Nixon as the Director of Sales and Public Affairs, and Mr. Simmons as the Director of Operations and Programming. (Stonewall Ex. 1 at 1-2). Together, they will serve on a Management Committee that will establish station policy and they will consult regarding major decisions on station operations. (Tr. 1477-78). Stonewall will not integrate Ms. Lambert into the management of Channel 2. (Tr. 1479).

89. Mr. Simmons and Mr. Whittington initiated the application for Channel 2 and interviewed potential investors. (Tr. 1164). Among the potential investors considered was Ms. Lambert. Mr. Simmons and Ms. Lambert had known each other since early 1986. Ms. Simmons had assisted and advised Ms. Lambert with respect to the upgrade of station KLTD(FM), Lampasas, Texas. (Tr. 1136). Throughout 1986, Mr. Simmons and Ms. Lambert worked together in selecting potential new transmitter sites for station KLTD. (Tr. 1187). From this relationship, Mr. Simmons knew Ms. Lambert very well and became generally aware of her financial resources. (Tr. 1702-03).

90. In December 1986 and early January 1987, Mr. Simmons prepared a preliminary budget that estimated the amount of money needed to build and initially operate Channel 2. (Tr. 1158). He mailed Ms. Lambert a copy of the tentative budget. (FC2 Ex. 17; Tr. 1159). Later that January, after Ms. Lambert's receipt of the preliminary budget, Mr. Simmons flew to New York City to meet with her regarding her possible participation as a non-voting stockholder in Stonewall. (Tr. 1156). While in New York, Mr. Simmons investigated Ms. Lambert's qualifications to provide sufficient funds to construct and then operate Channel 2 during its first three months on the air. (Tr. 1157). Mr. Simmons also negotiated the terms of Ms. Lambert's participation as a passive investor and invited her to purchase non-voting stock in the corporation. (Tr. 1173).

91. Before including Ms. Lambert as an investor in Stonewall, Mr. Simmons and Mr. Whittington had decided to seek the participation of a Fredericksburg resident as a voting stockholder. (Tr. 1388). Mr. Whittington discussed the prospect with a fellow attorney in Fredericksburg, who referred him to Ms. Nixon. (Tr. 1461). Mr. Simmons and Mr. Whittington invited her in March 1987 to purchase voting stock in Stonewall and to become an officer and member of the Board of Directors. (Tr. 1389-90). She agreed to be integrated into station management and purchased a one-third voting interest in Stonewall. (Tr. 1395).

92. There are exceptional circumstances under which Ms. Lambert may vote on Stonewall matters even though she holds non-voting stock. Texas state law requires that domestic corporations allow non-voting stockholders to vote on certain, limited matters not involved with day-to-day management or control. (Tr. 1497). Because Stonewall is incorpoated in Texas, Stonewall's corporate bylaws therefore must allow a non-voting stockholder to vote on those issues specified by law. (Tr. 1498).

93. In compliance with Texas state law, Stonewall's corporate bylaws provide that holders of non-voting stock are entitled to vote on the following issues: 1) merger, consolidation, reorganization, or sale of all or substantially all of the assets or stock of the corporation; and 2) liquidation, dissolution or recapitalization of the corporation. The Stonewall bylaws also provide that the non-voting shareholder may vote in one other, limited circumstance outside the ordinary course of business: the acquisition of any television or radio broadcast station or other acquistition out of the ordinary course of the business of the corporation and not incident to the operation of the corporation's business. (FC2 Ex. 16 at 6; Tr. 1501-02, 1505-06). Texas law does not require that non-voting shareholders be allowed to vote on the acquisition of a radio or television broadcast station. (Tr. 1131, 1498, 1500-01, 1722).

94. The issues on which Lambert is empowered to vote are decided by majority vote, and Lambert's 100 shares therefore give her a controlling vote on such issues. (Tr. 1134, 1412-13, 1507-08).

95. In exchange for their respective 10% equity interests in Stonewall, Simmons, Whittington and Nixon each made a $150 capital contribution to the company. (Tr. 1105, 1114, 1394, 1420, 1514). In addition to paying for their stock, these principals have expended their own mony to advance Stonewall's application. These expenditures have been made both in the form of a loan to the corporation and out-of-pocket expenditures. Mr. Simmons

has loaned Stonewall $10,000 to meet its on-going expenses. (Tr. 1227, 1230). Through the date of the hearing, Mr. Simmons also had spent additional sums on the application. (Tr. 1226). Mr. Whittington had spent over $3,500. (Tr. 1516, 1542). Ms. Nixon has spent about $1,700. (Tr. 1399, 1463).

96. Stonewall shareholder Lambert paid $700 for her 100 shares of stock. As of the date of the hearing, Lambert had provided Stonewall with approximately $60,000 to cover its expenses in this proceeding. (Tr. 1106, 1114). Upon receipt of a Stonewall bill, Whittington or Simmons sends a photocopy of the actual invoice to Lambert; Ms. Lambert then writes checks to Stonewall in amounts sufficient to cover outstanding bills. (Tr. 1495-96).

97. Some of the checks which Lambert has sent to Stonewall have references on the memorandum line of the checks, such as "loan for legal bill" or "for legal." (Tr. 1680-83; FC2 Ex. 20 at 1-3, 5). Other Lambert checks to Stonewall contain no such notations. When questioned about these notations, Mr. Whittington testified that he had never discussed with Lambert, or anyone else, any of the notations on the memorandum line of her checks and that he did not know Lambert's purpose in making the notations. He assumed it was "an internal thing with her." (Tr. 1735). Both Mr. Simmons and Mr. Whittington testified that Ms. Lambert does not have the ability to designate the purpose of her loans. (Tr. 1111, 1485).

98. Since the filing of Stonewall's application, Simmons and Whittington have kept Lambert generally informed of the progress of the application. (Tr. 1140, 1246-47, 1267). Simmons has spoken to Lambert on the telephone 15 to 20 times since the application was filed, and Whittington has spoken to her by telephone two or three times. (Tr. 1188, 1246, 1583). Whittington explained that he felt the need to keep Lambert informed about the application "because she's putting up all the money." (Tr. 1678).

99. If Stonewall's application is granted, all three voting shareholders will devote themselves full-time (at least 40 hours per week each) to their management duties at Channel 2. (Stonewall Ex. 1 at 1-2). Upon grant of the Stonewall application, Mr. Whittington will terminate his present employment and serve as full-time General Manager of the proposed station. (Stonewall Ex. 2 at 1). As General Manager, Mr. Whittington will be responsible for establishing station policy and will exercise overall authority, after consultation with Ms. Nixon and Mr. Simmons, for managing the station, for staffing and other personnel decisions, for programming decision-making, and for the station's public-service and community-affairs activities. In addition, he will direct a Management Committee that will meet weekly to discuss and establish station policies and objectives.

100. Mr. Whittington was born in 1941 in Dallas, Texas. He received a B.A. degree from the University of Texas in 1964 and a law degree from that institution in 1971. Upon attaining his law degree, Mr. Whittington began practicing as an attorney. He has been licensed to practice before the Supreme Court of Texas since 1971 and the Federal Courts of the United States since 1973. Mr. Whittington is currently practicing law as a solo practitioner in San Antonio.

101. He has served as in-house counsel for a corporation, negotiating business contracts and joint venture agreements and providing general business advice. Additionally, he served as Vice President and also as Secretary/Treasurer in managing that corporation. His current practice focuses primarily on representation of and advice to corporate clients on general business and corporate legal matters.

102. Mr. Whittington is a member of the San Antonio Bar Association and the American Bar Association. From 1973-1975, he served on the San Antonio Bar Association's Committee on Unauthorized Practice of Law, receiving and investigating complaints from the public on that issue.

103. Mr. Whittington coaches a children's soccer team in San Antonio within Stonewall's proposed Grade B service contour and has been a fundraiser and member of the McNay Art Museum which is also within Stonewall's proposed Grade B service contour. Mr. Whittington resides at 128 East Elmview Place, San Antonio, Texas and is a native of the State of Texas. He has lived within the Grade B service contour proposed by Stonewall for 17 years. If Stonewall is awarded the construction permit in this proceeding, Mr. Whittington will move to Fredericksburg, Texas.

104. Upon grant of the Stonewall application, Ms. Nixon also will terminate her present employment and serve as full-time Director of Sales and Public Affairs at Channel 2. (Stonewall Ex. 3 at 1). As Sales Director, she will direct the station's advertising sales program, supervise the sales staff and, in conjunction with the General Manager, will establish the budget and policies for the sales department. Her responsibilities will include identifying sales objectives and targets, directing sales efforts to meet those goals, and developing programming and promotional campaigns to support the sales effort.

105. In her capacity as Director of Public Affairs, Ms. Nixon will direct the station's ongoing efforts to identify the problems, needs, and interests of the Fredericksburg community. She will supervise the public affairs staff and develop an overall public affairs budget and policies in conjunction with the station's General Manager. Additionally, she will supervise production of public-affairs programming and public-service announcements responsive to community needs and interests and will be responsible for a program of public awareness for the station. She will serve on the station's Management Committee.

106. Ms. Nixon, a female and a native of Fredericksburg, was born in 1947 and resides within the Grade A service area of Channel 2 proposed by Stonewall. She graduated from Fredericksburg High School in 1966 and received a Bachelor of Science Degree from Sul Ross State University in 1970. Ms. Nixon also holds licenses from the State of Texas as a real estate salesperson and broker.

107. Upon graduation from college, Ms. Nixon was employed by the Fredericksburg Public School System, in which she taught elementary school until 1973. From 1974-1975, she was a salesperson for the Pioneer Land Company.

108. In 1975, Ms. Nixon, in conjunction with her husband, formed ERA Nixon Real Estate. From that time to the present, she has directed the advertising and marketing efforts for that business and has worked as a real estate broker. Ms. Nixon was also co-owner of Nixon Orchards from 1975 to 1985. She also was Vice President of Fredericksburg Finance, Inc., a mortgage company she co-owned with her husband from 1986 to 1987.

109. In 1981, the Mayor of Fredericksburg appointed Ms. Nixon to the Fredericksburg Home Rule Investigating Committee, which spearheaded an effort to secure home-rule government for Fredericksburg. Later in that year, Ms. Nixon was elected to the Fredericksburg Home Rule Charter Commission.

110. Ms. Nixon has been a member of Bethany Lutheran Church in Fredericksburg since 1971, a member of its Women's Singing Group since 1974 and has taught in its Sunday School since 1982. Ms. Nixon also has been a sponsor of the Bethany Luther League, a church group for teenagers.

111. From 1972-1982, Ms. Nixon was a member of the Jaycee Women of Fredericksburg, serving as its Secretary in 1974 and its President in 1975. She has been a member of the Fredericksburg schools Parent-Teacher Association since 1979, serving as Chairman of its Hospitality Committee in 1986 and assisting in fundraising activities. She has also been a member of the Gillespie County Historical Society since 1983, volunteering her services to raise funds and lead tours. Ms. Nixon is an active member of the Fredericksburg High School Band Boosters Organization.

112. Ms. Nixon has been a member of the Fredericksburg Chamber of Commerce since 1975, serving on its Board of Directors from 1976-1978. In 1977, she was co-Chairman of the Gillespie County Fair Queen Pageant and of the Gillespie County Fair Float Committee. In 1978, Ms. Nixon served on the Steering Committee to Organize a Board of Realtors in Gillespie County and, since 1979, has been a member of the Texas and National Associations of Realtors and the Gillespie County Board of Realtors. She is currently a Director of the Gillespie County Board of Realtors and formerly served as its Secretary in 1979 and as public relations co-Chairman for the Board's American Home Week in 1985-1986.

113. Ms. Nixon has been a life-long resident of Fredericksburg and will continue to reside in the community of license should Stonewall be awarded the permit to construct Channel 2.

114. Upon grant of the Stonewall application, Mr. Simmons will curtail his business activities and will serve as full-time Director of Operations and Programming at Channel 2. (Stonewall Ex. 4 at 1). Mr. Simmons will supervise personnel in the Operations and Programming departments and, in conjunction with the General Manager, will establish policies for these areas. Mr. Simmons also will be responsible for the hiring and firing of technical consultants and of Operations and Programming employees. He will recommend to the General Manager budgets for the departments under his supervision. He will serve on the station's Management Committee.

115. Mr. Simmons, a male, was born in 1940 in Dallas, Texas. He graduated from the University of Texas in 1964, receiving a B.A. degree in Government. He resides at 3605 Steck Blvd., No. 2133, in Austin, Texas. He has lived within the Grade B service contour proposed by Stonewall since 1983, and previously from 1959-1964. Upon grant of the Stonewall application, Mr. Simmons will move to Fredericksburg, Texas.

116. From 1964-1965, after serving on active duty in the United States Army Reserve, Mr. Simmons was sports editor for the Mexico City Times, and later worked as an announcer and part-time disc jockey for KUT-FM and KVET-AM in Austin, Texas. From 1965-1967, he was an assistant producer for D'Arcy Advertising, Inc. in New York. From 1967-1969 he promoted concerts for the Avalon Ballroom in San Francisco and worked as an announcer for KPFA-FM in Berkeley, California.

117. In 1969, Mr. Simmons became production director and air personality for KSJO-FM in San Jose, California. In 1970, Mr. Simmons move to KSFX radio in San Francisco where he assumed the same positions he had held at KSJO and also worked in the news department. In 1972, he became an air personality and special projects producer for KSAN-FM, also in San Francisco. In 1973, he was named program director of KOME-FM in San Jose.

118. From 1974 to 1976, Mr. Simmons worked for Paramount Records/Famous Music, Inc. and then for Arista Records as a promotion director and continued to work as a disc jockey and occasional special program producer for KSAN-FM. In 1977, Mr. Simmons started his own phonograph record label, World Records, in San Francisco, and produced and manufactured albums, some of which were sold to major record manufacturers such as CBS, Fantasy, and Pacific Arts. During this period, he also acted as a music consultant for KJAZ-FM in Alameda, California, and produced live country and western music shows once a week on KFAT-FM in Gilroy, California.

119. Also in 1977, Mr. Simmons became a party to a comparative proceeding for the deleted license of KISN-AM at Vancouver, Washington. Mr. Simmons was chosen Vice President of Ft. Vancouver Broadcasting, Inc., which through settlement prevailed and became the licensee of KKSN-AM (formerly KISN-AM) at Vancouver in 1979. From 1979 to 1983 Mr. Simmons was part owner and program director of KKSN-AM, the service area of which included metropolitan Portland, Oregon, as well as Vancouver. As program director, he was responsible for all management decisions related to programming. In 1983 Mr. Simmons resigned his position with Ft. Vancouver Broadcasting and KKSN and moved to Austin, Texas, where he continues to live and work as an announcer, producer and consultant regarding broadcast properties and production. He sold his interest in Ft. Vancouver Broadcasting, Inc. in 1983. (Tr. 1155).

120. Throughout his communications career, Mr. Simmons has been affiliated with industry organizations, such as the American Federation of Television and Radio Artists, International Brotherhood of Electrical Workers, and National Association of Broadcasters.

121. Since 1986, Mr. Simmons has volunteered his services as a broadcasting consultant to the University of Texas Student Task Force on Radio, helping that group in its quest to acquire a permit for and construct a radio station on the Austin campus. The Task Force is located within Stonewall's proposed Grade B service contour for Channel 2.

122. Stonewall has no mass media interests other than the instant application. (Stonewall Ex. 1). None of the principals of Stonewall has any cognizable interest in any other medium of mass communications. *Id.*

Comparative Coverage

123. Based on their technical proposals, the applicants would reach the following areas and populations within their proposed Grade B contours:

Grade B

Applicant	Area (Square Miles)	Population
Global	7,644	198,704
TexStar	15,057	1,240,636
Frontier	9,717	158,894
FC2	13,601	1,682,100
Widsten	15,438	1,740,615
Stonewall	10,381	1,165,707

124. The applicants would provide first through fourth services as follows:

	1st Service Area		2nd Service Area		3rd Service Area	
	Sq. Mi.	Pop.	Sq. Mi.	Pop.	Sq. Mi.	Pop.
Global	0	0	0	0	2	51
TexStar	28	95	807	1,793	2,243	15,876
Frontier	16	54	759	1,830	1,957	5,058
FC2	0	0	125	447	879	3,517
Widsten	0	0	188	418	1,143	4,839
Stonewall	0	0	32	42	265	1,324

	4th Service Area		5th Service Area	
	Sq. Mi.	Pop.	Sq. Mi.	Pop.
Global	2	24	8	124
TexStar	511	3,338	93	463
Frontier	413	3,443	43	178
FC2	371	2,377	103	465
Widsten	433	3,137	136	523
Stonewall	243	2,543	73	166

125. Global's proposed coverage area contains a total population of 198,704 persons, of whom 51 receive two other television services, 24 receive three other television services, and 124 receive four other television services. TexStar's proposed coverage area contains a total population of 1,240,636 persons, of whom 95 receive no other television services, 1,793 receive one other television service, 15,876 receive two other television services, 3,338 receive three other television services, and 463 receive four other television services. Frontier's proposed coverage area contains a total population of 158,894 person, of whom 54 receive no other television services, 1,830 receive one other television service, 5,058 receive two other television services, 3,443 receive three other television services, and 178 receive four other television services. Fredericksburg Channel 2's proposed coverage area contains a total population of 1,682,100 persons, of whom 447 receive one other television service, 3,517 receive two other television services, 2,377 receive three other television services, and 465 receive four other television services. Widsten's proposed coverage area contains a total population of 1,740,615 persons, of whom 418 receive one other television service, 4,839 receive two other television services, 3,137 receive three other television services, and 523 receive four other television services. Stonewall's proposed coverage area contains a total population of 1,165,707 persons, of whom 42 receive one other television service, 1,324 receive two other television services, 2,543 receive three other television services, and 166 receive four other television services.

III. CONCLUSIONS OF LAW

Global Information Technologies, Inc.

126. Global is entitled to 100% full-time quantitative integration credit for the proposals of its two principals to work full-time in the management of Global's proposed station. Saleem Tawil will be the General Manager and Chief Engineer at the station, and Carmen Armistead will be the Sales Manager. The integration proposal is enhanced slightly by the commitment of each of Global's principals to move to Fredericksburg if Global is awarded the permit. Global receives a moderate integration enhancement for its 50% female ownership, and a slight enhancement for the broadcast experience of its principals.

127. Global and its principals have no attributable media interest.

TexStar Communications, Ltd.

128. Upon considering the testimony given at deposition and at hearing, it is clear that Guerra-Cox and Pedregon envision a 50/50 voting arrangement. *Memorandum Opinion and Order*, FCC 88M-1253 (released April 28, 1988), reflects the presiding officer's unwillingness to find that Section 9.3 of the Limited Partnership Agreement *literally* expresses this intention of the TexStar principals. Guerra-Cox stated that Section 9.3:

> " . . . stipulates that our decisions will be reached by unanimous consent. Neither one or the other one of us wants to be able to have the responsibility of going out and making a major decision without consultation of the other one. So, it's a protection factor for the both of us."

At deposition, Ms. Guerra-Cox testified as follows:

> "Q" Have you discussed with Mr. Pedregon what will happen if the two of you can't agree upon a matter?
>
> "A" (Ms. Guerra-Cox) "No, because we've reached an understanding that all of our decisions will be made by unanimous consent."

While the presiding officer disagrees with Guerra-Cox' claim that Section 9.3 of the Limited Partnership Agreement "stipulates" that "understanding", her testimony about how TexStar will in fact operate must be credited. So, too, must Pedregon's testimony be credited in this regard. According to him, Pedregon and Ms. Guerra-Cox agreed that "our agreement would proceed . . . by unanimous decision."

129. After this matter had been raised through the filing by Fredericksburg Channel 2 of a Motion to Dismiss TexStar's application, alleging a negative transfer of control of TexStar from Ms. Guerra-Cox to Mr. Pedregon, Ms. Guerra-Cox offered this unsatisfactory explanation at hearing:

> " . . . if we have a vote, I pick 60%, Mr. Pedregon picks 40%. My percentage overrides Mr. Pedregon's; that percent becomes the unanimous vote of TexStar Communications."

130. After the B-cutoff date of April 7, 1987, while discussing the Limited Partnership Agreement in the office of Mr. Pedregon's attorney, Mr. David Jackson, the TexStar principals reached their "understanding" concerning the requirement for unanimity. At hearing, Mr. Pedregon stated:

> "We discussed the fact that under those certain provisions we would need a unanimous consent. She agreed. No big deal. We have a wonderful relationship. Why should we dwell on it?"

131. TexStar may not be awarded full integration credit for Ms. Guerra-Cox' interest since the degree of her control over the applicant was reduced after the B-cutoff date. On that date, April 7, 1987, she had 60% voting control. However, at some point after that date, Ms. Guerra-Cox could exercise only 50% control because the TexStar principals formed the intention that this be so. Because Mr. Pedregon gained equal voting control with Ms. Guerra-Cox, her position must be reduced to a 50% voting interest. Because Mr. Pedregon's increased interest was acquired after the B-cutoff date, he can not be credited for integration purposes with more that the 40% voting control he originally held. Therefore, TexStar will be awarded 90% quantitative integration credit.

132. In *Ownership Attribution*, 58 RR 2d 604 at 619 the Commission instructs that "the Partnership Agreement should restrict exempt limited partners from communicating with the licensee or the general partner on matters pertaining to the day-to-day operations of its business." The Partnership Agreement of TexStar Communications, Ltd., contains no such provision. However, that small failing is not viewed as rendering TexStar's limited partner "non-passive," especially since the Partnership Agreement does explicitly, in Section 9.10, prohibit the general partner from communicating or attempting to communicate with the limited partner on the partnership's day-to-day affairs.

133. TexStar's 90% quantitative integration credit, for the proposed full-time participation of Guerra-Cox as General Manager and Pedregon as Business Manager, is substantially enhanced by virtue of the fact that both of those principals are of Hispanic descent. Additionally, Guerra-Cox' proposed participation is moderately enhanced because of her status as a female. The integration proposal is moderately enhanced by Guerra-Cox' present and former service area residency and her promise of future local residency, all coupled with Mr. Pedregon's long time residency in Fredericksburg itself. Moderate enhancement is awarded for the extensive participation by TexStar's general partners and civic activities within Fredericksburg and also within the Grade B contour of the proposed station. Finally, Guerra-Cox' broadcast experience garners for TexStar a very slight enhancement.

Frontier Broadcasting, Inc.

134. Frontier certified to the Commission that it had reasonable assurance of the availability of its originally proposed transmitter site on the basis of a brief telephone conversation between Frontier principal Mitchell Johnson and site owner Honig in which none of the essential terms of site availability were discussed and in which Honig informed Johnson, at most, that he would be willing to negotiate with Johnson in the future (or, in Honig's words "next year") concerning the availability of the site. Johnson testified that he believed when certifying the site's availability that the site would be available to him on the same terms on which Honig had previously made it available to applicant Global, but Johnson admitted that he had no idea what those terms were and never attempted to find out. At the time Johnson certified the site's availability, he was under some pressure to meet the deadline for filing Frontier's application, which was only one day away. Johnson's only conversation with Honig occurred at 4:39 p.m. on February 11, 1987, the day before the February 12, 1987 filing deadline for the application. At the time Johnson spoke with Honig, Frontier had already prepared the engineering for its application based on use of the Honig site, and time constraints were such that Frontier would have been unable to file its application at all had it been unable to go forward with the specification of the Honig site.

135. Frontier did not have reasonable assurance of the availability of the Honig site when it certified the site's availability to the Commission. Reasonable assurance requires "more than a vague . . . 'willingness to deal'" on the part of the site owner. *Progressive Communications, Inc.*, 61 RR 2d at 563; *Houston Family Television, Limited*, 101 FCC 2d at 664. Although a binding agreement or absolute assurance is not necessary, "a mere possibility, assumption, or hope that the site will be available will not suffice." *Houston Family Television, Limited*, 101 FCC 2d at 664. What is required is either "a formal option to lease the land" or "informal discussions with the land owner . . . which result in a meeting of the minds as to the key lease terms upon which the land will be made available." *Progressive Communications, Inc.*, 61 RR 2d at 563. Fronter had neither. Accordingly, reasonable assurance was not present.

136. There is no evidence that Frontier attempted to engage in an intentional deception when specifying its initial transmitter site. The evidence indicates instead an altogether careless designation of the site without having received the degree of assurance required by the Commission. The false certification issue is resolved in favor of Frontier.

137. Frontier proposes no integration of its ownership into the management of the station, and is therefore entitled to no integration credit. Frontier also holds construction permits for six low power television stations, one of which is located in Austin, Texas. It thus receives a diversification demerit. The individual holdings of Frontier stockholder Oliver Heard also contribute to the diversification demerit that must be assessed.

Fredericksburg Channel 2

138. Fredericksburg Channel 2 is entitled to 100% quantitative integration credit for the participation of its sole general partner, Bob A. Roth, as full-time General Manager of FC2's proposed station. Roth is a long time resident of San Antonio, Texas, within the Grade B contour of the proposed station, and has an impressive record of civic participation there. These considerations substantially enhance the integration proposal. Finally, Mr. Roth's extensive broadcast experience enhances the integration proposal to a slight degree.

139. Fredericksburg Channel 2 introduced as part of its direct case exhibits a statement that station KO2MX "will be taken off the air" if FC2 receives the permit for Channel 2 at Fredericksburg. Fredericksburg Channel 2

did not state prior to the B-cutoff date that Mr. Roth would divest himself of his interest in the KO2MX licensee should FC2 win the Channel 2 construction permit for Fredericksburg.

140. Fredericksburg Channel 2 takes the position that it is merely stating a truism in saying that KO2MX "will be taken off the air" if FC2 receives the permit here. The argument appears to be that that result will obtain by operation of the Commission Rules:

> " . . . the low power television station . . . which operates *within the predicted Grade B contour* of FC2's proposed station and *on the same channel* as the full power authorization at issue here, would obviously cause interference to FC2's proposed full power Channel 2 Fredericksburg station, should both be operated simultaneously, and would therefore be required as a matter of law to cease operations, pursuant to 47 CFR Section 74.703, when FC2's proposed full power facility commenced operations."

Taking that view, FC2 sees no need of a pre- B-cutoff divestiture commitment concerning Roth's interest in KO2MX. But the effect is not the same as it would have been with a straightforward pre- B-cutoff divestiture commitment. A timely divestiture commitment would have constituted Roth's *promise* to the Commission that his interest in KO2MX would be extinguished if FC2 receives a grant here. That promise to the Commission would have been enforceable by the Commission. That the low power station "will be taken off the air" by operation of law, in the circumstances of this case, leaves the Commission without any means of assuring that that will in fact be so. That is because Roth and the KO2MX licensee will continue to have, under the Commission Rules, the opportunity of making choices which, unlike with a straightforward divestiture commitment, could keep KO2MX and Roth *on the air*. The Commission amended its Rules prior to the B-cutoff date in this proceeding to allow low power television stations displaced by authorization of conflicting primary services to continue operation by moving to different available channels -- without competition from other applicants. *Low Power Television and Television Translator Service*, 62 RR 2d 423 (1987).

141. It is true, as FC2 says, that "Roth testified repeatedly and without contradiction that his intent was to take the low power Channel 2 station *off the air*, and not to seek to acquire some other channel." But each of Roth's promises, contained in FC2's Integration and Diversification Statement, its Answers and Objections to Interrogatories, and in Roth's direct case testimony, was made after the April 7, 1987 B-cutoff date in this proceeding. Fredericksburg Channel 2 will be assessed a slight diversification demerit for its general partner's B-cutoff date ownership and management of station KO2MX. *Garad Broadcasting Co.*, 1 FCC Rcd 181, 188 (Rev. Bd. 1986).

Hal S. Widsten

142. Widsten will receive no integration credit. Widsten stated to the Commission in October of 1986 that he would be integrated full-time as the General Manager of a proposed FM station in Oro Valley, Arizona, for which Widsten is seeking an authorization. In February of 1987, Widsten filed his application in this proceeding, and he testified that he intended from that date on to be integrated full-time as the General Manager of his proposed Fredericksburg station. In October of 1987, Widsten filed his integration statement in this proceeding, in which he specifically proposed that he would be integrated full-time as the General Manager of his proposed Fredericksburg station. In January of 1988, after questioning at his deposition in this proceeding spurred him to action, Widsten filed an amendment to his Oro Valley FM application in which he retracted his full-time integration proposal in that proceeding. Widsten took no action, however, to in any way amend, alter or retract his Oro Valley integration proposal at any time during the 11-month period which elapsed between February 12, 1987, when Widsten filed his application in this proceeding (and when, according to his testimony, he formulated his intention to be fully integrated in his proposed Fredericksburg station), and January of 1988, when his deposition occurred and brought the problem of his two conflicting integration proposals to light.

143. In an effort to explain why he had not acted to amend his Oro Valley integration proposal when he allegedly formulated his intention respecting his Fredericksburg integration proposal in February of 1987, Widsten first claimed that he had "forgotten" about the Oro Valley proposal at that time. This testimony was in conflict with his earlier deposition testimony to the effect that he had consciously and specifically thought about the Oro Valley integration proposal at the time he filed his Fredericksburg application. Under cross examination at hearing, Widsten admitted that his deposition testimony was correct and that he did in fact recall and consciously consider the Oro Valley integration proposal in February of 1987, when he filed his application in the instant proceeding.

144. Widsten claimed at hearing that he had been "confused" at the time he filed his Fredericksburg application and had thought that he had proposed in his Fredericksburg application to "divest" his Oro Valley "situation". But Widsten's deposition testimony contradicted his claim at hearing that he had intended at all times subsequent to the February 1987 date of the Fredericksburg application to pursue his Fredericksburg integration proposal, and not his Oro Valley integration proposal. In flat contradiction of his hearing testimony, Widsten testified during his deposition, in January of 1988, that he had intended at the time he filed his Oro Valley application and at all times up to and including the very date of his deposition in January of 1988 to honor his Oro Valley integration proposal, should he secure a construction permit for the Oro Valley station. That admission, which occurred long after the "cut-off" date for submitting integration proposals in this proceeding, defeats Widsten's integration claim here.

145. The Commission will accord no credit to an integration proposal which is contingent or inconsistent with another pending proposal on the pertinent cut-off date on which the integration proposal is required to be set forth in final form. *Houston Family Television, Limited*, 101 FCC 2d 661 (Rev. Bd. 1985). Rather, proposals must be "certain and definite . . . on the date . . . [the] parties were required to set forth their proposals," which date in this proceeding was the October 8, 1987 date set for the exchange of integration and diversification statements. *Northland Communications*, 100 FCC 2d 914, 918 (Rev.

Bd. 1985). Widsten's purported full-time integration proposal in this proceeding was completely inconsistent with his outstanding, unretracted full-time Oro Valley integration proposal on the October 8, 1987 exchange date in this proceeding, as well as at all subsequent times up to and including the date of his deposition in January 1988. Widsten's testimony during his deposition in January of 1988 that he intended at that time, long after the pertinent integration proposal cut-off date in this proceeding, to fully honor his Oro Valley integration commitment demonstrates that Widsten's purported "commitment" in this proceeding is not to be credited.

146. If Widsten were to be awarded any integration credit, he would receive qualitative enhancement for broadcast experience, civic involvement, and residency within his proposed Grade B contour.

Stonewall Broadcasting, Inc.

147. Stonewall receives 100% quantitative integration credit for the proposed full-time participation of its three voting stockholders in the management of the station. Ms. Nixon 33 & 1/3% integration is moderately enhanced by her female status, and substantially enhanced by her long term local residence and record of civic participation in the city of license. Mr. Whittington's integration is moderately enhanced by his service area residency and participation in civic activities there, and slightly enhanced by his promise of future residency in Fredericksburg. Mr. Simmons' integration is moderately enhanced by his service area residency and civic participation there; slightly enhanced by his promise to move to Fredericksburg in the event of a grant to Stonewall; and the proposal is slightly enhanced by Mr. Simmons' broadcast experience.

Comparative Coverage

148. Of the six applicants, TexStar's proposed coverage appears superior to that of its nearest competitors, FC2 and Widsten. TexStar's proposed service encompasses 95 persons who receive no other television service and approximately 1,300 more persons who receive one other television service. TexStar's proposed service also encompasses approximately 11,000 more persons who receive two other television services. TexStar's proposed service is inferior to that proposed by FC2 and Widsten with respect to total population coverage: it encompasses a total population of between 400,000 and 500,000 fewer persons than the total populations proposed by FC2 and Widsten. The Commission's primary concern is with providing underserved areas with first or second services. *Mark L. Wodlinger*, 101 FCC 2d 762 (Rev. Bd. 1985). But since TexStar will serve a smaller area and fewer people than would FC2 and Widsten, TexStar will be accorded only a slight preference for its service to underserved areas.

149. The three remaining applicants, Stonewall, Frontier and Global, offer coverage that is inferior to that proposed by TexStar, FC2 and Widsten. Stonewall proposes significantly less service to underserved areas than do TexStar, FC2 and Widsten, and it proposes a total service area population of fewer persons than the total populations proposed to be served by FC2, Widsten and TexStar. TexStar, FC2 and Widsten are therefore entitled to moderate to substantial preferences over Stonewall.

150. Frontier proposes service to underserved areas about equal to that proposed by TexStar, with the exception of service to persons receiving two other television signals, where TexStar enjoys a 10,000 person advantage. Frontier's total service area population is tiny, however, compared to those proposed by TexStar, FC2 and Widsten. TexStar deserves a moderate coverage area preference over Frontier. Frontier's proposed service to underserved areas entitles it to some preference over FC2 and Widsten, but this preference is offset by the greater total service area populations proposed by FC2 and Widsten.

151. Global proposes only minute service to underserved areas (service to fewer than 200 persons receiving two, three or four other television services), and service to an equally small total service area population – 198, 704 persons. Each of the other applicants is entitled to a substantial comparative coverage preference over Global.

IV. ULTIMATE CONCLUSIONS

152. Frontier is disqualified on the site availability issue. Fredericksburg Channel 2 receives a slight demerit on the primary comparative factor of diversification of control of the media of mass communications. TexStar receives less than 100% quantitative integration credit. Widsten receives no integration credit. Thus, the qualified applicants receiving 100% full-time quantitative integration credit are Global and Stonewall. Between the two, Stonewall deserves a substantial comparative coverage preference over Global. That preference, along with Stonewall's significantly greater qualitative enhancements of its integration proposal, makes Stonewall the preferred applicant herein. Stonewall's application will be granted.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is received by the Commission on its own motion, the application of Stonewall Broadcasting, Inc. IS GRANTED, and the applications of Global Information Technologies, Inc., TexStar Communications, Ltd., Frontier Broadcasting, Inc., Fredericksburg Channel 2, and Hal S. Widsten, ARE DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] Fredericksburg Channel 2's motion was denied upon the presiding officer's view that Section 9.3 of the Limited Partnership Agreement had no such effect. *Memorandum Opinion and Order*, FCC 88M-1253, released April 28, 1988.

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

LEO V. CARMODY File No. 22729-CD-P/L-1-85

For authority to establish a new one-way signaling facility on the frequency 152.84 MHz in the Public Land Mobile Service at Greenville, New York

and

NEW JERSEY BELL TELEPHONE COMPANY File No. 21316-CD-P/L-1-85

For authority to establish a new one-way signaling facility on the frequency 152.84 MHz in the Public Land Mobile Service at Stanhope, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 1989; Released: July 11, 1989

By the Chief, Common Carrier Bureau:

1. Leo V. Carmody (Carmody) has filed a petition for reconsideration of the Mobile Services Division's (MSD) action dismissing his Greenville, New York application. Mobilfone of Northeastern Pennsylvania, Inc. (Mobilfone)[1] filed an opposition to the petition for reconsideration and Carmody has replied. Also pending is the captioned mutually exclusive application of New Jersey Bell Telephone Company (New Jersey Bell) with Carmody's Greenville application. We will grant reconsideration for the reasons which follow.

I. BACKGROUND

2. On April 1, 1985, Carmody filed an application for frequency 152.84 MHz at Greenville, New York (File No. 22729-CD-P/L-1-85). The Carmody application was placed on public notice on April 24, 1985. By letter dated January 6, 1987, the MSD dismissed the Carmody application on the grounds that, pursuant to Section 22.31(c) of the Commission's Rules, it was cut-off from comparative consideration with the application filed by Hudson Valley Mobile Telephone, Inc. (Hudson Valley) (File No. 21642-CD-P-1-83) for the same frequency in Ulster, New York. The Common Carrier Bureau in its *Order on Reconsideration*, 61 Rad. Reg. 2d (P&F) 95 (Com. Car. Bur. 1986), had accepted for filing Hudson Valley's application *nunc pro tunc* as of November 14, 1984, the filing date of Hudson Valley's amended application, and indicated that the 60 day cut-off period for filing mutually exclusive applications with Hudson Valley's application began on January 2, 1985, the public notice date for Hudson Valley's application, and ended on March 4, 1985. The MSD pointed out that since Carmody's Greenville application was filed after the established cut-off date, it was untimely filed. New Jersey Bell filed an application for frequency 152.84 MHz at Stanhope, New Jersey (File No. 21316-CD-P/L-1-85) on December 28, 1984.

II. CONTENTIONS OF THE PARTIES

3. In his petition for reconsideration, Carmody contends that the MSD's determination that his Greenville application is mutually exclusive with Hudson Valley's Ulster application is erroneous. Carmody claims that the MSD's January 6, 1987 letter does not specify how his Greenville proposal conflicts with the proposed Hudson Valley station. In any event, Carmody states that the Carey study submitted with his Greenville application demonstrates interference protection from Hudson Valley's proposed station. Furthermore, Carmody points out that Hudson Valley acknowledges that its Ulster application is not mutually exclusive with Carmody's Greenville application. In this regard, Carmody points out that on July 18, 1985 Hudson Valley filed an informal objection to Carmody's Greenville application, alleging that the application was mutually exclusive with Hudson Valley's Ulster application. However, by letter dated August 13, 1985, Hudson Valley withdrew its informal objection on the basis that its Carey study, which originally showed that Carmody's Greenville application was mutually exclusive with its Ulster application, was erroneous. Finally, Carmody submits an additional engineering statement demonstrating the lack of interference to the proposed Hudson Valley station. Carmody concludes that in view of the significant evidence showing that his Greenville application does not cause electrical interference to Hudson Valley's proposed station, the Commission should rescind the dismissal of his Greenville application and reinstate the application *nunc pro tunc*.

4. In opposition to the petition for reconsideration, Mobilfone takes no position as to whether Carmody's Greenville application is mutually exclusive with Hudson Valley's Ulster application. Rather, Mobilfone argues that Carmody's Greenville application is independently cut-off by a second chain of mutually exclusive applications. In this regard, Mobilfone submits the engineering statement of David Carter who indicates that a "daisy chain" of mutual exclusivity runs through the following applications: Mobilfone's Waverly, New York application (File No. 21122-CD-P/L-1-85) filed on December 12, 1984; Carmody's Binghamton, New York application (File No. 22497-CD-P/L-1-85) filed on March 25, 1985; Commonwealth Telephone Company's application for Fairview, Pennsylvania (File No. 21458-CD-P/L-1-85) filed on January 11, 1985; Mobilfone's Monticello application (File No. 22505-CD-P/L-1-85) filed on March 25, 1985; and Carmody's April 1, 1985 Greenville application. Mobilfone contends that Carmody's Greenville application is part of this chain of mutually exclusive applications because it is directly mutually exclusive with Mobilfone's Monticello application. According to Mobilfone, the cut-off period for filing applications mutually exclusive with Mobilfone's Waverly application, the first-filed application in the "daisy chain," began when

the application appeared on public notice on January 23, 1985 and ended on March 23, 1985. Mobilfone argues that since Carmody's Greenville application was filed outside the cut-off deadline, it should be dismissed as defective pursuant to Sections 22.20(b)(7) and 22.31(c) and (d) of the Commission's Rules.[2] Mobilfone contends that the operation of the cut-off rule in this case is not changed where its own Monticello application was later dismissed as defective[3] or where the MSD originally dismissed Carmody's Greenville application on other grounds. Thus, Mobilfone requests that the Bureau dismiss Carmody's Greenville application as being cut-off by Mobilfone's Waverly application.

5. In reply, Carmody disagrees that its Greenville application is mutually exclusive with Mobilfone's Waverly application. In support of his position, Carmody cites *Arnold Anderson d/b/a Concho Communications*, (Concho) Mimeo No. 2543 (Com. Car. Bur., released February 27, 1984), for the proposition that a chain of mutually exclusive applications is broken when one of the links in the chain is a defective application. In accordance with *Concho*, Carmody asserts that his Greenville application may not be treated as mutually exclusive with Mobilfone's first-filed Waverly application because Mobilfone's Monticello application, the only application that was directly mutually exclusive with his Greenville application, has been dismissed. In addition, Carmody argues that the public interest is furthered by adhering to *Concho*. Were the Commission to adopt a policy of allowing untimely filed intervening applications in a "daisy chain" to cut-off later filed but otherwise acceptable applications, Carmody argues that such defective intervening applications, such as Mobilfone's Monticello application, could block service to the areas proposed by the defective applications and to those areas adjacent to it.

III. DISCUSSION

6. Upon reviewing further the MSD's interference studies, we find that Carmody's proposal for Greenville, New York does not cause interference to Hudson Valley's proposed Ulster station as stated in the MSD's letter of January 6, 1987. As shown in Carmody's interference study submitted in his petition for reconsideration, his Greenville proposal meets the required minimum ratio of Reliable Service Area Contour (RSAC) field strengths for interference-free operation.

7. Before reinstating Carmody's application, we must deal with Mobilfone's contention that Carmody's Greenville application should nevertheless be dismissed because it is independently cut-off by a second chain of mutually exclusive applications.

8. According to Section 22.31(b) of the Rules, if two applicants, A and B, successively file applications which are mutually exclusive, the cut-off deadline of B is established by the public notice date of A's application. Section 22.31 (c), known as the "Daisy Chain Rule," states:

> "Whenever three or more applications are mutually exclusive but not uniformly so, the earliest filed application establishes the date prescribed in paragraph (b)(2) of this section, regardless of whether or not subsequently filed applications are directly mutually exclusive with the first filed application."

9. Similarly, whether an application is timely or not must be determined as of the time of filing, not by an event occurring after the cut-off date. *See King Communications, Inc., supra*. Standing alone, when Carmody filed his Greenville application it was mutually exclusive with Mobilfone's Monticello application and therefore was part of an independent "daisy chain" with Mobilfone's Waverly application. However, at the time that Mobilfone filed its Monticello application on March 25, 1985, it was mutually exclusive with Hudson Valley's first-filed Ulster application and, as such, was subject to the cut-off deadline established by Hudson Valleys' Ulster filing, *i.e.* March 4, 1985. Since Mobilfone's Monticello application was untimely filed with Hudson Valley's Ulster application, it was therefore dismissed.[4] Having dismissed Mobilfone's Monticello application, Carmody's Greenville application was no longer mutually exclusive with Mobilfone's Monticello application and, as a consequence, is not part of an independent "daisy chain" with Mobilfone's Waverly application. Accordingly, Carmody's Greenville application cannot now be treated as being mutually exclusive with Mobilfone's Waverly application because the Greenville and Waverly applications are not mutually exclusive.

10. Having found that the January 6, 1987 dismissal of Carmody's Greenville application should be reversed and that the application is not part of an independent "daisy chain," we will return it to pending status. Therefore, the application will be reinstated *nunc pro tunc*.[5] Our records nevertheless reveal that the Greenville application is mutually exclusive with an application filed by New Jersey Bell on December 28, 1984, for frequency 152.84 MHZ in Stanhope, New Jersey. The Stanhope application was placed on public notice on January 30, 1985. However, since Carmody filed its application on April 1, 1985, within 60 days of the public notice of the Stanhope, New Jersey filing, it was timely filed.

11. Accordingly, IT IS ORDERED That the Petition for Reconsideration filed by Leo V. Carmody, File No. 22729-CD-P/L-01-85, IS HEREBY GRANTED.

12. IT IS FURTHER ORDERED, That the Opposition to the Petition for Reconsideration filed by Mobilfone of Northeastern Pennsylvania, Inc., IS DENIED.

13. IT IS FURTHER ORDERED, That the application of Leo V. Carmody, File No. 22729-CD-P/L-1-85, BE REINSTATED AND IS RETURNED TO PENDING STATUS and a lottery will be conducted to resolve any mutually exclusivity between applications filed by the captioned parties. The lottery will be held at a time and place to be specified in a subsequent public notice.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Mobilfone provides two-way and one-way radio common carrier service in Pennsylvania and New York.

[2] In support of its position, Mobilfone cites *William G. Bowles, Jr. d/b/a Mid-Missouri Mobilfone*, 61 Rad. Reg. 2d (P&F) 20 (Com. Car. Bur. 1986); *Mobile Communications, Inc.*, Mimeo No. 3029 (Com. Car. Bur., released March 12, 1985); and *Berks County Communications, Inc.*, Mimeo No. 4435 (Com. Car. Bur., released June 8, 1982).

[3] By letter dated January 5, 1987, the MSD dismissed the Monticello application on the grounds that it was cut-off from comparative consideraton with the Hudson Valley Ulster application (File No. 22729-CD-P/L-1-85) pursuant to Section 22.31(c). In any event, Mobilfone argues that even if its Monticello application or any other application in the cut-off chain are dismissed and not reinstated, those dismissals cannot save Carmody's untimely filed application citing *King Communications, Inc.*, Mimeo No. 5099 (Com. Car. Bur., released June 11, 1986).

[4] *See supra* at note 3. Although a petition for reconsideration of this dismissal is pending, the filing of such a petition does not stay the effectiveness of the dismissal action. *See* Section 1.106(n) of the Rules.

[5] Nunc pro tunc treatment may be given to reinstate applications which have incorrectly been dismissed. *Mobile Telecommunications Corp.*, 49 Rad. Reg. 2d (P&F) 1505, 1511-12 (1981). *See also Jackson Signal Company*, 74 FCC 2d 514 (1979) and *Communications Gaithersburg, Inc.*, 60 FCC 2d 537 (1976).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-309

In re Applications:

CABRINI COLLEGE File No. BPED-860725MH
(hereafter Cabrini)
Radnor Township, Pennsylvania
Req: 88.5 MHz, Channel 203A
0.7 kW (V), 68.3 meters

VILLANOVA UNIVERSITY IN THE STATE OF PENNSYLVANIA File No. BPED-870402KA
(hereafter Villanova)
Villanova, Pennsylvania
Req: 88.5 MHz, Channel 203A
0.7 kW (V), 68.3 meters

BUX-MONT EDUCATIONAL RADIO ASSOCIATION File No. BPED-870514MN
(hereafter Bux-Mont)
Sellersville, Pennsylvania
Req: 88.7 MHz, Channel 204A
0.1 kW (V), 133 meters

TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA File No. BPED-870515OE
(hereafter WXPN)
Philadelphia, Pennsylvania
Req: 88.5 MHz, Channel 203B
3.1 kW (H), 332.2 meters

For a Construction Permit
For a Non - Commercial
Educational FM Station

HEARING DESIGNATION ORDER

Adopted: June 28, 1989; Released: June 29, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a non-commercial, educational FM station.[1]

2. *Preliminary Matters.* Villanova originally filed for authorization to operate a noncommercial station on April 24, 1986[2]. On December 9, 1986, the Commission, by letter from the then acting Chief, FM Branch, informed Villanova that its application was deficient. Specifically, the application contained an incorrect showing of the biological effects of the radio frequency radiation that might be caused by its proposal as required by Section 1.1307 of the Commission's Rules. In addition, the TV Channel 6 interference showing submitted was not in conformance with the requirements set forth in 47 C.F.R. § 73.525. The Commission requested that an amendment be filed correcting these deficiencies within 30 days and informed Villanova that failure to respond within the time allotted would result in the dismissal of its application pursuant to 47 C.F.R. § 73.3568. On February 25, 1987, not having received any response from Villanova, the Commission returned Villanova's application.

3. On March 9, 1987, Villanova informed the Commission that its engineering consultants, Educational FM Associates of Duxbury, MA, had earlier requested an extension to respond to the December 9, 1986 deficiency letter. Villanova explained that it was seeking an extension as it was in the process of negotiating a share-time agreement with Cabrini. Under the terms of the agreement Villanova would broadcast from Cabrini's transmitter site, thus negating the need for further technical information with regard to Villanova's original proposal. On April 2, 1987, Villanova amended its application to specify identical engineering data as Cabrini.[3] In light of the outstanding extension request which was inadvertently overlooked in the December 9, 1986 return letter, Villanova will be herein reinstated, as amended as of April 2, 1987. However, since the amendment filed comprised a major change necessitating a new file number, Villanova's application will be designated under its new file number (BPED-870402KA) and not under the originally assigned file number (BPED-860424MO).

4. As noted above, Cabrini and Villanova propose a share-time agreement. This proposal, however, does not include any agreement to share time with Bux-Mont or WXPN with which Cabrini and Villanova are mutually exclusive. Therefore, an issue will be specified to determine whether a share-time agreement between all of the applicants would be the most effective use of the frequency, and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (Oct 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a time-sharing issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing from participating in negotiations with a view toward establishing a share-time arrangement.

5. On November 1, 1988, the four applicants filed a Joint Motion for Approval of Agreement. Under the terms of the proposed settlement agreement, Cabrini and Villanova agree to amend their share-time proposal to specify operation on Channel 206A rather than Channel 203A. Bux-Mont agrees to change its proposed operation from Channel 204A to Channel 205A. Further, a request for a waiver of Section 73.509 of the Commission's Rules was filed as WXPN would receive interference from both the Bux-Mont proposal and the Cabrini and Villanova share-time proposal. Cabrini and Villanova would also receive interference from WWFM, a noncommercial station licensed in Trenton, New Jersey. Upon examination

of the Agreement, for reasons stated below, we find it to be unacceptable and, accordingly, it will herein be denied and all accompanying amendments returned.

6. Cabrini, the lead applicant, pursuant to 47 C.F.R. § 73.3573(d), was put on *Public Notice* of acceptance for filing announcing June 15, 1987 as the date by which all mutually exclusive applications must be filed, otherwise referred to as the "A cut-off" date. All new applications and/or major change amendments were to be filed by the "A cut-off" date. Minor change amendments were to have been filed as a matter of right by December 6, 1988, the "B cut- off" date in this proceeding. The amendments filed in conjunction with the Agreement, specifying frequency changes for Cabrini, Villanova and Bux-Mont, are major change amendments pursuant to 47 C.F.R. § 73.3573(a). Since the amendments in question are major change amendments, the amendments would require the assignment of a new file number to the amended applications pursuant to 47 C.F.R. § 73.3573(b). The filing of an amendment necessitating a new file number after the "A cut-off" date would require the dismissal of the application as untimely filed. The major change amendments filed in conjunction with the proposed settlement agreement were filed on November 1, 1988, well after the June 15, 1987 *Public Notice* "A cut-off" date. None of the applicants requested a waiver of the Commission's cut-off rules. Therefore, acceptance of the amendments would prove fatal to the applications of Cabrini, Villanova and Bux-Mont, leaving only the application filed by WXPN. Long standing Commission policy provides for return of predesignation major change amendments which would cause the dismissal of mutally exclusive applications. *See St. Croix Wireless Co.*, 2 FCC Rcd 4447 (MM Bur. 1987). The action of denying the proposed settlement mandates that we designate the applications for a comparative hearing as originally filed.

7. *Villanova*. Although Villanova'a application does show compliance with the radio frequency radiation guidelines under 47 C.F.R. § 1.1307(b), pursuant to the July 6, 1987 share-time agreement it no longer wishes to construct at the initially proposed site, but rather intends to share the facilities proposed by Cabrini. Cabrini has sufficiently demonstrated in its application that steps will be taken to insure that the facilities are in compliance with the Commission's Rules. Accordingly, Villanova shall also be responsible for insuring that the proposed facilities are in compliance with the radio frequency guidelines under 47 C.F.R. § 1.1307(b).

8. *Bux-Mont*. A review of Bux-Mont's engineering data reveals that the height of the radiation center above ground level, listed in Section V-B, Item 6 of the application, exceeds the overall tower height as listed in Section V-G, Item 5. Because the proposed antenna is to be mounted above the existing tower, Bux-Mont must amend its application to specify the overall height of the tower including all appurtenances. This error has no effect on the acceptability of Bux-Mont's application which complies with all of our technical requirements. Accordingly, Bux-Mont must submit an amendment correcting the above-noted deficiency within 30 days of the release of this Order.

9. *WXPN*. WXPN proposes to share an existing antenna with television station WPVI(TV) in Philadelphia, Pennsylvania on WPVI's existing tower structure. Television facility KYW(TV), Philadelphia, also shares this tower structure. According to the Commission's data base, the accepted coordinates for this tower are 40-02-39/75-14-26. Examination of the transmitter site map submitted by WXPN reveals a discrepancy as to either the plotted coordinates or those listed in Section V-B and V-G of the application. In addition, according to the Commission's data base the accepted radiation center above ground level (RCAGL) for the the WPVI(TV) antenna is 327 meters. WXPN, while proposing to share this antenna, has listed the RCGAL as 337 meters in Section V-B, Item 6 of its application. Accordingly, WXPN will be required to file an amendment correcting the transmitter site map and the antenna RCGAL within 30 days of the release of this Order.

10. *Other Matters*. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

11. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncomercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for a hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the number of other reserved channel non-commercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

2. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide superior FM educational broadcast service.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That the application filed by Villanova IS HEREBY REINSTATED, as amended.

15. IT IS FURTHER ORDERED, That the Joint Motion for Approval of Agreement filed by the four applicants is HEREBY DENIED and the accompanying amendments filed by Cabrini, Villanova and Bux-Mont ARE HEREBY RETURNED.

16. IT IS FURTHER ORDERED, That Villanova file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order showing that it shares responsibility with Cabrini for compliance with the radio frequency guidelines under 47 C.F.R. § 1.1307(b).

17. IT IS FURTHER ORDERED, That Bux-Mont amend its application specifying the correct height of its proposed tower including all appurtenances with the presiding Administrative Law Judge within 30 days of the release of this Order.

18. IT IS FURTHER ORDERED, That WXPN amend its application with a new site map correctly plotting the coordinates of its proposed location and specifying the correct radiation center above ground level. This amendment must be filed with the presiding Administrative Law Judge within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communication Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time ad in the manner prescribed in such Rule, and shall advise the Commission of th publication of such notices as required by Section 73.3594 of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] WXPN is a licensed and operating station proposing to change frequencies and upgrade from Channel 205A to Channel 203B. All other applicants are applying for a new service.

[2] This application was assigned the file number of: BPED-860424MO.

[3] When filed, this amendment was treated as a new application as it was filed before the designated "A cut-off date", the last date for filing a mutually exclusive application. Accordingly, the Commission's records reflect that Villanova has one application (BPED-860424MO) returned on February 25, 1987, and one outstanding application (BPED-870402KA).

Before the
Federal Communications Commission
Washington, D.C. 20554

MCI TELECOMMUNICATIONS
CORPORATION,
Complainant,

v. File Nos. E-89-88
through E-89-110

THE BELL TELEPHONE COMPANY OF
PENNSYLVANIA, *et al.*
Defendants.

ORDER

Adopted: June 29, 1989; Released: June 30, 1989

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. The above-captioned complaints of MCI Telecommunications Corporation (MCI) were filed in order to trigger the limitations provision of the Communications Act, 47 U.S.C. § 415. The complaints concern the exclusive provision of certain services and facilities to the American Telephone and Telegraph Company (AT&T) pursuant to the Shared Network Facilities Agreements (SNFAs) negotiated between AT&T and the Bell Operating Companies (BOCs) at the time of the AT&T divestiture. MCI alleges that it has received like services pursuant to BOC Special Access tariffs which are unreasonably discriminatory *vis a vis* the SNFAs, and seeks damages calculated, *inter alia*, as per the difference between Special Access rates and lower SNFA rates. The lawfulness of the BOC Special Access tariffs also is the issue in the Commission's court-mandated review of these tariffs.[1]

2. On February 27, 1989 the Chief, Formal Complaints and Investigations Branch, issued a Notice of Formal Complaint serving MCI's complaints on the affected Bell Operating Companies (BOCs) and directing the defendants to file answers by March 29, 1989, with replies and other pleadings scheduled in accordance with Commission Rules governing formal complaints. *MCI v. The Bell Telephone Company of Pennsylvania, et al.*, File Nos. E-89-88 through E-89-110, Notice of Formal Complaint (Feb. 27, 1989).

3. On April 5, 1989, MCI filed a Motion for Extension of Time (Motion) seeking an extension, until September 13, 1989, in which to file replies to answers and oppositions to motions to dismiss in the above-referenced formal complaint proceedings. The Common Carrier Bureau (the Bureau) denied MCI's Motion by Order released April 19, 1989 (DA 89-418). In its Order, the Bureau stated that it would organize further proceedings in order to assure sufficient time for discovery and briefing as well as Commission deliberation.

4. On May 3, 1989, an organizational meeting was held with the Acting Chief, Enforcement Division, and all parties to the various SNFA proceedings. At that meeting, a tentative decision was made to consolidate all outstanding complaints on this subject matter, including the instant MCI complaints, since the cases all involved voluminous documents that were substantially identical. Since the proceedings were governed by the Federal Communications Commission Authorization Act of 1988 (FCCAA)[2], the schedule was determined in light of a November 3, 1989 decision date required to meet the terms of the statute for SNFA-related complaints filed by the BOCs. Thereafter, on June 13, 1989, the Commission dismissed SNFA-related complaints filed by AT&T and BOCs. *See Illinois Bell Telephone Company, et al., v. American Telephone and Telegraph Company*, Order, FCC 89-202 (released June 13, 1989). Pursuant to that dismissal, we establish the following schedule for the surviving MCI SNFA complaints:

June 13, 1989 - SNFAs made available by the defendants for inspection and copying.[3]

September 13, 1989 - End of discovery period.[4]

October 13, 1989 - Submission of direct case by plaintiff.

November 13, 1989 - Submission of defendants' responses and reply cases.

December 13, 1989 - Initial briefs of the parties.

December 27, 1989 - Reply briefs of the parties.

5. Accordingly, IT IS ORDERED, pursuant to the authority delegated in 47 C.F.R. § 0.291, that the discovery and briefing schedule described herein is ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Acting Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] *See Investigation of Special Access Tariffs of Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166 - Phase I, FCC 86-52, (released Jan. 24, 1986) *rev'd sub nom. MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988) (MCI Order).

[2] Pub. L. No. 100-594, 102 STAT. 3021, 3023 § 8 (Nov. 3, 1988). The FCCAA, *inter alia*, amended Section 208 of the Communications Act to require that complaints which relate to "the lawfulness of a charge, classification, regulation, or practice" of a communications common carrier shall be resolved by the Commission, by issuance of a final, appealable order, within 12 months of the filing of such complaints, or within 15 months thereafter in cases which present questions of fact of "extraordinary complexity." 47 U.S.C. § 208(b)(1).

[3] This is in accord with the June 13, 1989 SNFA filing date imposed by the Bureau in the parallel Special Access tariff investigation mandated by the MCI Order. *See* Memorandum Opinion and Order, CC Docket No. 85-166, Phase I (released May 9, 1989).

[4] Commission Rules provide for the filing of interrogatories as of right within a prescribed timeframe triggered by the service of the complaint. 47 C.F.R. § 1.729. All other discovery is discretionary with the Commission. 47 C.F.R. § 1.730. In the instant case, initial interrogatories have been filed. Owing to the complexity of the record, however, we will allow additional discovery, including additional interrogatories, requests for additional documents and depositions, within the timeframe provided herein. Requests for discovery for the period after September 13, 1989, will not be granted.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONSORTIUM COMMUNICATIONS INTERNATIONAL INC.

File Nos. I-S-P-89-001
I-S-P-87-006

Petitions for Waiver of the Commission's International Competitive Carrier Policies.

MEMORANDUM OPINION AND ORDER

Adopted: June 29, 1989; Released: July 11, 1989

By the Chief, International Facilities Division:

I. INTRODUCTION

A. Summary of Pleadings

1. On December 12, 1988 Consortium Communications International, Inc. (CCI) filed a Petition for Clarification or, In the Alternative, Waiver seeking a Commission ruling to allow it to be treated as a non-dominant carrier in its provision of international common carrier services. CCI asked the Commission either to find that CCI's foreign parent, AirCall PLC, through its subsidiary AirCall Medical (Holdings) Limited, was not a foreign telecommunications entity and thereby declare CCI not to be a dominant foreign-owned carrier for its provision of international communications services or to grant CCI a waiver of the Commission's international competitive carrier policies that classify all foreign-owned carriers as dominant in their provision of international common carrier services.[1] Pan American Satellite (PAS) filed comments on CCI's petition.

B. May 15, 1989 Letter

2. In a May 15, 1989 letter to the Commission, Telenet Communications Corporation (Telenet), which formerly owned a 66 percent interest in CCI, advised that, on April 30, 1989, it had acquired AirCall's 34 percent interest and that, as a result, CCI is now wholly owned by Telenet.[2] Telenet states that, by the May 15, 1989 letter, Telenet and CCI withdraw the December 12, 1988 petition or, in the alternative, ask the Commission to dismiss the petition.[3] Telenet served PAS with a copy of its May 15, 1989 letter[4] and PAS filed no response to the letter. We construe Telenet's May 15, 1989 letter as a request that we find CCI to be non-dominant.

II. DISCUSSION

3. In its *International Competitive Carrier* decision,[5] the Commission determined that the dynamic growth in the international telecommunications market and the successful experience in the domestic market to eliminate unnecessary and burdensome regulations demonstrated that it should rely increasingly on market forces to regulate international common carrier offerings. As a result, the Commission streamlined its regulations for non-dominant carriers providing international common carrier services. It concluded that a firm would be considered dominant if it has market power, and listed factors the Commission would consider in any determination of market power, such as market share, control of bottleneck facilities, rate of return, and actual or potential competition. Based on its analysis of the international market, the Commission concluded that international telecommunications are properly divided into five product markets: international message telephone services (IMTS), non-IMTS, INTELSAT space segment, multi-purpose earth station services and television services. It further concluded that all carriers except foreign-owned carriers are non-dominant in their provision of non-IMTS services such as telex and private line services, and that all carriers except AT&T, offshore providers and foreign-owned carriers are non-dominant for IMTS. In sum, with the limited exceptions of (1) AT&T's IMTS, (2) the provision of IMTS on non-contiguous domestic points, (3) the provision by certain carriers of multi-purpose earth station services, television services, and space segment services, and (4) services provided by foreign-owned carriers,[6] all carriers are non-dominant in their provision of international common carrier services.

4. Once a carrier has been held to be dominant, it should comply fully with the requirements of the Commission's rules and regulations applicable to dominant carriers until such time as the Commission has affirmatively altered its determination and has explicitly notified the carrier. The Commission's notification also serves as a means to modify existing authorizations to provide international services to eliminate any conditions imposed on the carrier solely by virtue of its status as a foreign-owned dominant carrier. In this proceeding, the record demonstrates that CCI is an international record carrier, with Section 214 authorizations to provide telex and private line services.[7] Moreover, based on the record before us in this proceeding, there is no evidence that CCI is a provider of off-shore IMTS, multi-purpose earth stations, television services or INTELSAT space segment services nor that its provision of international common carrier services carries with it any of the indicia of market power discussed in the Commission's decision in *International Competitive Carrier*.[8]

5. The May 15, 1989 and June 19, 1989 letters, supported by the affidavit of the Vice President, Finance of CCI, state that AirCall has sold its 34 percent interest in CCI to Telenet and that AirCall and Italcable no longer have any right to elect a representative to CCI's board of directors. The representations of counsel for Telenet and the affidavit of Timothy O'Connor, provide record evidence that no "foreign telecommunications entity," as that term is used in the Commission's *International Competitive Carrier* policy, has any ownership interest in CCI. As a result, we conclude in this proceeding that CCI should no longer be considered a dominant carrier in the provision of its licensed international common carrier services by virtue of its classification as a foreign-owned carrier. Furthermore, under the provisions of the Commission's decision in *International Competitive Carrier*, lacking any other evidence of market power, we find no reason to conclude that CCI is in fact dominant in its provision of

non-IMTS international common carrier services. Given these findings, we conclude that CCI is a non-dominant carrier under the provisions of the Commission's decisions in *International Competitive Carrier*.

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. Section 0.291 (1988), that Telenet's May 15, 1989 request for dismissal IS GRANTED.

7. IT IS FURTHER ORDERED that the CCI petitions in F.C.C. File Nos. I-S-P-89-001 and I-S-P-87-006 ARE DISMISSED and these proceedings ARE TERMINATED.

8. IT IS FURTHER ORDERED that Telenet's request that CCI be found non-dominant in its provision of international common carrier services IS GRANTED and that any Section 214 authorizations previously granted to CCI for the provision of international common carrier services ARE HEREBY AMENDED to eliminate the conditions imposed on CCI solely as a result of its status as a dominant carrier under paragraphs 72-73 and footnotes 74-76 of the Commission's decision in *International Competitive Carrier*.[9]

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] CCI's December 12, 1988 petition was its second waiver request. On July 30, 1987, CCI had sought a partial waiver of its dominant status. TRT had opposed CCI's first waiver petition. At the time of its first filing, CCI had been owned by Telenet, AirCall and Italcable, S.p.A. *See* F.C.C. File No. I-S-P-87-006. While its first waiver petition was pending, CCI filed its second waiver request, which advised that Telenet, which previously had held a 51 percent interest in CCI, acquired Italcable's 15 percent interest in CCI in August 1988.

[2] At the Commission's request, Telenet supplemented its May 15, 1989 letter in a letter of June 19, 1989. Telenet's June 19, 1989 letter attaches an affidavit from Timothy O'Connor, Vice President, Finance of CCI, which states that, in addition to AirCall's sale of its ownership interest in CCI, AirCall and Italcable no longer have representatives on CCI's board of directors.

[3] Telenet also states that, absent notification to the contrary, CCI will act as a non-dominant carrier. In 1986, in the *Memorandum Opinion and Order* granting Telenet's application to acquire 60 percent ownership in CCI from AirCall, a British corporation, the Common Carrier Bureau held CCI to be a dominant carrier in its provision of international common carrier services because of AirCall's 40 percent ownership interest in CCI. *See* ENF-86-07 (released April 30, 1986).

[4] *See* CCI's May 18, 1989 Supplemental Filing in CC Docket No. 86-494, seeking deletion of CCI from Section 43.81 of the Commission's Rules, 47 C.F.R. Section 43.81. CCI's Supplemental Filing references and attaches a copy of its May 15, 1989 letter. CCI certifies that it served the Supplemental Filing on PAS.

[5] 102 F.C.C. 2d 812 (1985) *recon. denied* 60 Rad. Reg. 2d (P&F) 1435 (1986).

[6] The Commission defined a foreign-owned carrier, for purposes of the *International Competitive Carrier* policies, as a carrier that is over 15 percent directly or indirectly owned by a foreign telecommunications entity or a carrier on whose board of directors a representative of a foreign telecommunications entity sits. The Commission included a provision for the grant of waivers for good public policy reasons, such as where foreign investments are large but passive, but also emphasized that it also could impose dominant carrier status where debt holdings or small equity investments are below the threshold ownership requirements, but are not passive. 102 F.C.C. 2d at 842, n.74. The Commission later clarified the term "foreign telecommunications entity" by stating that foreign telecommunications entities include telecommunications and telecommunications - related equipment manufacturers, equipment suppliers and service providers. *Regulatory Policies and International Telecommunications, Report and Order and Supplemental Notice of Inquiry*, CC Docket 86-494, FCC 88-71 (released March 25, 1988) at n.74.

[7] *See* CCI petition, F.C.C. File No. I-S-P-89-001, filed December 12, 1988, at n.1.

[8] For example, TRT's opposition and PAS' pleading in, respectively, I-S-P-87-006 and I-S-P-89-001 were limited solely to the foreign ownership aspects of *International Competitive Carrier*. Neither party suggested that CCI should be held to be dominant under other provisions of the Commission's decision.

[9] 102 F.C.C. 2d at 842-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ST. THOMAS & SAN JUAN TELEPHONE COMPANY, INC. — File No. I-T-C-89-097

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 29, 1989; Released: July 11, 1989

By the Chief, International Facilities Division

1. The above-captioned application, filed on April 14, 1989 by St. Thomas & San Juan Telephone Company, Inc. (STSJ), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on April 26, 1989.[1]

2. The applicant is a non-dominant domestic resale common carrier. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[2] We find that the market will support additional carriers and that the added competition will be in the public interest.[3]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by STSJ.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-89-097, IS GRANTED, and STSJ is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, Allnet's Tariff F.C.C. No. 5 and FTCC's Tariff F.C.C. No. 23 between the United States and those points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Petitions to Deny were filed and later withdrawn by Caribbean Automated Long Lines Services and John N. Ackley.

[2] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[3] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB COMMUNICATIONS GROUP, INC. File No. CSG-89-061-P/L

Application for authority to construct and operate a C-band earth station at Culver City, California, for provision of international television, INTELSAT Business Service and SCPC audio service to points in the Pacific Ocean Region.

ORDER AND AUTHORIZATION

Adopted: June 30, 1989; Released: July 11, 1989

By the Chief, International Facilities Division:

1. The captioned application, filed on March 10 with supplements filed on March 29, April 24 and June 27, 1989, by IDB Communications Group, Inc. (IDB), requests authority, pursuant to Title III of the Communications Act of 1934, as amended, and Section 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at Culver City, California, for the provision of international television, INTELSAT Business Service (IBS) and SCPC audio services. The application was placed on public notice on March 22, 1989. No comments were received. IDB has been granted authority to establish channels of communications between the U.S. and various international points for provision of international television, IBS and SCPC audio services.[1]

2. The proposed earth station will consist of an 8.1-meter antenna meeting INTELSAT Standard F-2 technical parameters communicating with INTELSAT satellites in the Pacific Ocean Region (POR) in the 5925-6425 MHz transmitting frequency band and the 3700-4200 MHz receiving frequency band. The antenna will be located at Culver City, California, and will be used to provide international television, IBS and SCPC audio services. IDB states that it will obtain from INTELSAT a non-standard designation when and if necessary to use the earth station in a manner that is not standard for INTELSAT Standard F/G earth stations.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television service earth stations and multipurpose earth stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose earth stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only the minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act of 1934, as amended, when processing IBS and television service applications. The Commission further concluded that, absent special problems, it would treat these applications as routine and expeditiously process them.[3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. IDB's legal, financial and technical qualifications to construct and operate the proposed earth station are established. IDB has constructed other international earth station facilities for use in provision of IBS and television services.[5] The proposed earth station shall comply with INTELSAT Standard F-2 technical parameters, and IDB has completed the necessary frequency coordination.

5. The scope of operation of the proposed earth station will be the same as that permitted by the Commission in previous IBS/television authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation, SCPC audio service, and television service. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a separate application for the additional authority.

6. Upon consideration of the application, we find that authorization of the requested earth station facilities to provide international television, IBS and SCPC audio services would serve the public interest.

7. Accordingly, IT IS ORDERED, pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-89-061-P/L IS GRANTED, and IDB is authorized to construct and operate the proposed 8.1-meter C-band earth station at Culver City, California, to provide international television, IBS and SCPC audio services.[6]

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* IDB Communications Group, Inc., DA 86-412, released Dec. 31, 1986, File No. I-T-C-87-013 and DA 88-1400, released Sept. 13, 1988, File No. I-T-C-88-048.

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS and/or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] *See* IDB Communications Group, Inc., Mimeo No. 2523, released March 27, 1987, File No. CSG-87-025-P/L.

[6] This authorization is not to be construed as permitting the provision of IBS, SCPC audio, or televison service between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-89-102

Application for authority to acquire and operate facilities for service between the U.S. and Taiwan.

ORDER AND AUTHORIZATION

Adopted: June 29, 1989; Released: July 11, 1989

By the Chief, International Facilities Division:

1. The above-captioned application filed on April 28, 1989 by American Telephone and Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate 320 voice-grade circuits in the Taiwan-Guam (TAIGU) cable for service between the U.S. and Taiwan. The application was placed on public notice on May 10, 1989. No comments were received. Upon consideration of the application, we find that authorization of the requested services and facilities is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-102 IS GRANTED, and AT&T is authorized to:

a. acquire by IRU from International Telecommunications Development Corp. (ITDC) of Taiwan through its wholly owned subsidiary, Transpacific Communications, Inc., a one-half interest in and operate 320 voice-grade 3-KHz circuits in the Taiwan-Guam (TAIGU) cable; and

b. use said facilities to provide AT&T's regularly authorized services between the U.S. and Taiwan and beyond.

3. The Commission's temporary authorization, granted May 9, 1989, is hereby terminated.

4. No substantial changes inconsistent with this or any other relevant Commission order shall be made before final execution of an IRU agreement between AT&T and ITDC and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
AT&T of the
VIRGIN ISLANDS, INC.

File No. I-T-D-89-006

Application for authority to deactivate and retire the Florida-St. Thomas Cable System

ORDER AND CERTIFICATION

Adopted: June 30, 1989; **Released: July 11, 1989**

By the Chief, International Facilities Division:

1. On May 18, 1989, the American Telephone and Telegraph Company and AT&T of the Virgin Islands, Inc. (applicants) filed the above-captioned application requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to deactivate and retire the cable portion (First Florida Cable) of the Florida-St. Thomas-Puerto Rico Cable and Microwave Radio System. The application was placed on public notice on May 24, 1989. No comments were received.

2. The First Florida Cable was placed in service in December, 1964, and is now approximately 25 years old. It is an SD technology cable, having a capacity of 142 voice-grade circuits, composed of pre-transitor, vacuum tube vintage equipment, for which off-the-shelf replacement parts are no longer readily available. On February 24, 1989, the First Florida Cable failed because of a deep sea fault. The applicants decided that because of its age and the necessary expenditures, major costs could be avoided if the First Florida Cable was retired. Applicants state that substitute facilities are available via both the Third Florida-St. Thomas Cable System and the domestic satellite system. AT&T further states that none of the IRU holders has expressed any objection or concern with respect to the retirement of the system.

3. Upon review, we find that the First Florida Cable has reached the end of its useful service life and that useful substitute facilities are available via both the Third Florida-St. Thomas Cable System and the domestic satellite system. Under these circumstances, we conclude that the permanent discontinuance of the First Florida cable and the transfer of service to either the domestic satellite system or the Third Florida-St. Thomas Cable System can be accomplished with no discontinuance, reduction, or impairment of any service to any community or any part of a community now served by the First Florida Cable.

4. Accordingly, IT IS HEREBY CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the discontinuance and operation by the applicants of the First Florida Cable and the substitution of other facilities.

5. Within 60 days after the release of this order, the applicants shall notify the Commission of the accounting treatment they intend to use in retiring the First Florida Cable System.

6. Upon discontinuance of use and operation of the First Florida Cable System, the applicants shall notify the Commission thereof and submit to the Commission for cancellation any submarine cable landing license they possess covering the First Florida Cable System.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applicants for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FIRST PHONE OF NEW ENGLAND, INC. File No. I-T-C-89-105

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 30, 1989; Released: July 12, 1989

By the Chief, International Facilities Division:

1. The above-captioned applications filed on April 25, 1989 by First Phone of New England, Inc. (First Phone), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on May 10, 1989. No comments were received.

2. The applicant is a non-dominant domestic resale common carrier. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by First Phone.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-89-105, IS GRANTED, and First Phone is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2, between the United States and those points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION CORPORATION — File No. I-T-C-89-061

For authority to lease and operate two telegraph-grade circuits in the U.S. - Cuba No. 7 Cable System for service between the U.S. and the Republic of Cuba.

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 1989; Released: July 12, 1989

By the Chief, International Facilities Division:

1. The above-captioned application filed on February 27, 1989, by Western Union Corporation (WU) requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate two telegraph-grade circuits in the U.S. - Cuba No. 7 Cable System for service between the U.S. and the Republic of Cuba (Cuba). The application was placed on public notice on March 1, 1989. Comments were filed on March 23, 1989, by the American Telephone and Telegraph Company (AT&T).

2. For many years WU, whether styled as such or as ITT World Communications or McKay Radio and Telegraph Company has been providing message telegraph service between the United States and Cuba. Presently WU provides its U.S. - Cuba telegraph service via a high frequency radio facility operated by Mobile Marine Radio, Inc. at Mobile, Alabama. The HF circuits have deteriorated over time to the point where messages must repeatedly be re-sent. WU proposes to replace the two HF circuits with more dependable telegraph circuits in the U.S. - Cuba No. 7 Cable System. Upon authorization and activation of the two telegraph-grade circuits in the U.S. - Cuba No. 7 Cable System, it proposes to discontinue operation of its HF radio facility at Mobile, Alabama.

3. AT&T in its Comments does not oppose a grant of WU's application, but rather notes that a grant of the instant application does not require the allocation of additional circuits. Currently, three full voice-grade circuits are provided for U.S. - Cuba record services in the U.S.-Cuba No. 7 Cable System. These circuits operated by Western Union International, RCA Global Communications, Inc., and Cuban American Telephone and Telegraph (CATT), can each be equipped to provide from 17 to more than 100 telegraph-grade channels by utilizing appropriate multiplexing techniques. Since 1961, the United States has exercised an embargo upon trade and commercial relations between the United States and Cuba.[1] WU and its predecessors have for many years prior to the Cuban Embargo provided telegraph service between the U.S. and Cuba. WU's present HF radio facilities are deteriorating and the lease and operation of telegraph-grade circuits in the U.S. - Cuba No. 7 Cable System offers a more dependable and reliable means of communication to the public. The Department of State in implementing the Cuban Embargo has imposed certain annual voice circuit activation limits.[2] However, additional voice circuit activation is not an issue here. The necessary telegraph-grade circuits can be made available by utilizing appropriate multiplexing techniques with existing voice circuit without recourse to the activation of additional voice circuits. In view of the foregoing, we find a grant of WU's application for two telegraph-grade circuits in the U.S. - Cuba No. 7 Cable System will serve the public interest. We will, however, expect WU to comply with Sections 63.10(c) and 23.49 of the Commission's Rules in discontinuing its HF radio system.

4. Accordingly, in view of the foregoing, IT IS ORDERED that application File No. I-T-C-89-061 IS GRANTED and WU is authorized to: (1) lease and operate two telegraph-grade circuits in the U.S. - Cuba No. 7 Cable System for service to Cuba, together with the necessary connecting facilities; and (2) provide its authorized services between points in or reached via both the United States and Cuba.

5. IT IS FURTHER ORDERED that the grant of application File No. I-T-C-89-061 is subject to the same terms, conditions and limitations set forth in (1) In the Matter of AT&T *et. al.*, File Nos. I-T-C-87-046 *et. al.*, Memorandum Opinion, Order and Authorization released January 8, 1988, 3 FCC Rcd 45 (1988) and (2) In the Matter of AT&T *et. al.*, File No. S-C-L-87-004, Cable Landing License released January 8, 1988, 3 FCC Rcd 50 (1988).

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] 22 U.S.C. 2370 (1962).

[2] Letter from Acting Director, Bureau of International Communications and Information Policy, Department of State, to Chairman, Federal Communications Commission, dated July 31, 1987; Letter from Director, Office of Regulatory and Treaty Affairs, Department of State to Assistant Chief, International, Common Carrier Bureau, dated September 16, 1987. *See also*, Letter from U.S. Coordinator and Director, Bureau of International Communications and Information Policy, Department of State, to Chairman, Federal Communications Commission, dated December 5, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

COMMUNICATIONS SATELLITE CORPORATION — CSG-89-078-P/L

For authority, pursuant to Title III of the Communications Act of 1934, as amended, to construct and operate a nine-meter C-band TRMS antenna in Etam, West Virginia in order to provide testing of the TDMA switch on the first INTELSAT-VI spacecraft

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: June 30, 1989; Released: July 12, 1989

By the Chief, International Facilities Division:

1. On May 2, 1989, the Communications Satellite Corporation (Comsat) filed the above-captioned application requesting authority to construct and operate a temporary transmit/receive nine-meter C-band earth station for use in testing the onboard Time Division Multiple Access (TDMA) switch of the first INTELSAT-VI spacecraft in connection with the TDMA Reference and Monitoring Services (TRMS) Comsat will provide for INTELSAT from the American Telephone and Telegraph Company (AT&T) earth station facility in Etam, West Virginia.[1] The application was placed on public notice May 10, 1989. No comments were received. We grant the application for the reasons set forth below.

2. Comsat states that when the first INTELSAT-VI spacecraft is launched in July 1989, Comsat and INTELSAT will perform testing of the satellite switched TDMA (SSTDMA) system on that spacecraft using a Satellite Switched TDMA Reference and Monitoring System (SSTRMS) at Etam. Comsat expects to begin testing in mid-August and to continue for approximately six months, although if the launch date slips or if further testing of the switch is required, Comsat will need additional time.

3. According to Comsat, since a spare antenna does not exist at Etam from which to conduct the testing, construction of a temporary antenna will be necessary. Comsat states the nine-meter C-band antenna will be installed at the site of the former Comsat international earth station facility at Etam, now owned by AT&T. Comsat proposes to operate the earth station in the 5850-6425 MHz transmitting frequency band and the 3625-4200 MHz receiving frequency band. The antenna system, with its HPA and LNA receive systems, will be interconnected to existing up- and down-convertors, to the Etam control building, and finally connection will be made to a new SSTRMS terminal. Comsat states that when spacecraft testing begins, it will be under the direction of INTELSAT engineers and operated by the Comsat TRMS staff.

4. Comsat explains that in order to meet the operational requirements dictated by the spacecraft launch date, it is necessary to begin installation of the antenna by mid-July 1989. Comsat notes that the capital, operating and maintenance costs for this earth station will be paid for by INTELSAT pursuant to an amendment to an existing TRMS contract, and will not be reflected in any Comsat tariff.

5. Although Comsat proposes to provide testing services in the transmitting frequency band of 5850-6425 MHz and receiving frequency band of 3625-4200 MHz, a portion of these frequencies are subject to further coordination. We will defer our decision on 5850-5925 MHz of the transmitting frequency band and 3625-3700 MHz of the receiving frequency band until frequency coordination with the National Telecommunications and Information Administration (NTIA) is completed.

6. Upon review of the application, we find Comsat's plan to construct and operate a transmit/receive C-band earth in Etam, West Virginia station for use in testing the onboard TDMA switch of the first INTELSAT-VI spacecraft and for providing TRMS for INTELSAT is operationally sound. The proposed construction will not adversely affect the environment and the antenna will comply with all applicable rules.

7. We therefore conclude that it would serve the public interest to allow Comsat to construct and operate a nine-meter C-band antenna to provide INTELSAT with the ability to test the SSTDMA system of the INTELSAT-VI spacecraft, with the result of ensuring specified performance following launch. The testing will promote reliable INTELSAT operations and support the operation of the first INTELSAT-VI spacecraft.

8. Accordingly, IT IS ORDERED that application File No. CSG-89-078-P/L IS GRANTED pursuant to Sections 304, 308, 309 and 319 of the Communications Act of 1934, as amended, 47 U.S.C. 304, 308, 309 and 319 and Sections 201 and 305 of the Communications Satellite Act of 1962, as amended, and Comsat is authorized to construct and operate a nine-meter C-band TRMS antenna at Etam, West Virginia, in order to provide testing of the switched TDMA system on the first INTELSAT-VI spacecraft.

9. IT IS FURTHER ORDERED that all operations in the extended frequency bands, 5850-5925 MHz and 3625-3700 MHz, are subject to International Footnote 806 and U.S. Footnote 245 in Section 2.106 of the Commission's Rules, CFR Section 2.106 and to final coordination with NTIA. Any conditions or limitations in these bands will be indicated on Comsat's licenses.

10. Before completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

11. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] The application is filed pursuant to Sections 304, 308, 309 and 319 of the Communications Act of 1934, as amended, and Section 305 of the Communications Satellite Act of 1962 as amended.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-89

In the Matter of

Imposing Syndicated Exclusivity
Requirements on Satellite Delivery
of Television Broadcast Signals
to Home Satellite Earth Station
Receivers

ORDER GRANTING MOTIONS FOR EXTENSION OF TIME TO FILE COMMENTS

Adopted: June 29, 1989; Released: July 3, 1989

By the Chief, Mass Media Bureau:

1. On April 12, 1989, the Commission adopted a *Notice of Inquiry and Notice of Proposed Rule Making*, 4 FCC Rcd 3889 (1989) *("Notice")*, in the above-captioned proceeding in order to establish a record upon which to determine the feasibility of applying the Commission's syndicated exclusivity rules to satellite-delivered video programming received by home satellite dishes. In addition to the general question of feasibility, the *Notice* sought comment on a wide variety of issues such as the compliance costs accruing to satellite carriers, the existence of alternative methods of compliance, the breadth of coverage, and the precise form of any rules that we might ultimately adopt. The Commission established a deadline of July 7, 1989, for filing comments, and a deadline of August 4, 1989, for filing reply comments.

2. Before the Commission are two motions for extension of time, one filed by the Satellite Broadcasting and Communications Association of America ("SBCA") on June 22, 1989, and the other a joint request filed by the National Association of Broadcasters, the Association of Independent Television Stations, and the Motion Picture Association of America ("NAB *et al.*") on June 23, 1989. Both motions request an extension of time to file comments until August 7, 1989, and reply comments until September 5, 1989. Both motions are unopposed.

3. SBCA requests an extension of time to analyze the impact of a recent report indicating that a group of cable multiple system operators is planning to deliver by satellite a package of programming that includes distant broadcast signals. SBCA believes that the requested extension of time will permit it to confirm this report and review its effect on the issues set out in the *Notice*.

4. NAB *et al.* request an extension of time for two reasons. First, these movants state that a considerable amount of the comment period has been expended already in enlisting the services of experts. NAB *et al.* emphasize that expert assistance to help them respond to the *Notice* is necessary because of the highly technical nature of the issues at hand. Thus, an extension of time is needed to permit their experts to analyze the issues and to incorporate that analysis in their comments. Second, NAB *et al.* point to the close relationship of this proceeding to the Commission's separate inquiry into the need for a universal encryption standard for satellite programming. *Notice of Inquiry* in Gen Docket No. 89-78, 4 FCC Rcd 3479 (1989). They assert that the choice of an encryption standard could affect the technical feasibility of implementing exclusivity rules. Thus, NAB *et al.* maintain that it would be beneficial for the parties to this proceeding to be able to review the comments and reply comments filed in the encryption standard proceeding before commenting on the feasibility of applying exclusivity rules to satellite-delivered programming.

5. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, it is our policy that extensions of time not be routinely granted. In order to evaluate the proposals made in the *Notice*, we expect interested parties to provide analysis of a broad range of complex technical and economic issues. Petitioners, which collectively represent broadcast, satellite, and production interests, are in an especially unique position to provide such analysis and, therefore, affording the additional time requested may greatly increase the quality and scope of the data and analysis submitted. In turn, this could be instrumental in resolving many of the complex issues presented in the *Notice*. We will therefore grant the motions and extend the deadline for filing initial comments to August 7, 1989, and the deadline for filing reply comments to September 5, 1989.

6. Accordingly, IT IS ORDERED that the Motion for Extension of Time filed by the Satellite Broadcasting and Communications Association of America, IS GRANTED.

7. IT IS FURTHER ORDERED that the Motion for Extension of Time filed jointly by the National Association of Broadcasters, the Association of Independent Television Stations, and the Motion Picture Association of America, IS GRANTED.

8. IT IS THEREFORE ORDERED that the time for filing comments and reply comments in this proceeding ARE EXTENDED to **August 7, 1989,** and **September 5, 1989,** respectively.

9. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, and 1.46 of the Commission's Rules.

10. For further information concerning this proceeding, contact David E. Horowitz, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION Tariff F.C.C. No. 103 — Transmittal No. 732

Promotional Rate for Intelsat Business Service.

ORDER

Adopted: June 30, 1989; Released: July 12, 1989

By the Chief, Common Carrier Bureau:

1. On May 22, 1989, Pan American Satellite Corporation (PAS) filed a petition requesting suspension and investigation of Communications Satellite Corporation (Comsat) Tariff F.C.C. No. 103, Transmittal No. 732. In that Transmittal, which is scheduled to take effect July 19, 1989, Comsat proposes to offer a promotional rate reduction to certain Intelsat Business Service (IBS) customers.

2. Under the terms of Transmittal 732, Comsat will offer a promotional rate reduction of 10 percent per circuit to IBS customers entering into long term service agreements. The IBS circuits subject to the promotion must be activated, converted, or renewed during the promotional period that will expire June 8, 1990. The discount will terminate one year from the end of the promotion period. Comsat states its promotional rate offer is intended to secure its IBS customer base for the next several years. Comsat Transmittal 732, Description and Justification at 1.

3. PAS claims that Comsat has filed inadequate cost support information. According to PAS, while Comsat says its IBS rates are based on Intelsat charges developed in 1983 and 1984 when IBS was first introduced, the actual cost of service provided pursuant to the long term contracts will be based on Intelsat Utilization Charges associated with new Intelsat VII Series satellites. Thus, concludes PAS, Comsat should file cost support material which incorporates cost estimates for the Intelsat VII satellites. PAS Petition at 3. PAS also disputes Comsat's claim that its proposed promotional discount is a competitive response that is necessitated by increasing competition from ocean cables. It argues that Comsat has failed to provide information about either the scope of the competitive threat or the rates its competitors are charging. *Id.* at 4.

4. Comsat replies that its cost support materials comply with the requirements of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. Comsat argues that under Section 61.38, a less detailed cost showing is appropriate because the proposed tariff is a promotional offering of a limited duration. Comsat Reply at 3. According to Comsat, PAS is merely seeking details for future Intelsat VII costs which are unrelated to the promotional offering. Furthermore, Comsat argues it is unnecessary for the Commission to delay the effectiveness of the promotional offering in order to investigate whether competition exists between satellites and fiber optic cables, since the existence of intermodal competition has been well documented by the Commission. *Id.* at 4-5.

5. The Common Carrier Bureau has reviewed the tariff transmittal and the pleadings. We conclude that no questions have been presented that warrant suspension and investigation at this time.

6. Accordingly, IT IS ORDERED that the petition to suspend and investigate filed by Pan American Satellite Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-339

In the Matter of

Establishment of a Program to
Monitor the Impact of Joint
Board Decisions

ORDER

Adopted: June 28, 1989; Released: June 30, 1989

By the Commission:

I. INTRODUCTION

1. On March 24, 1989, the Federal-State Joint Board (Joint Board) in CC Docket Nos. 78-72, 80-286, and 87-339 released its *Second Study and Report* reviewing the impact of its non-traffic sensitive (NTS) cost recovery program.[1] The Joint Board recommended that (1) the frequency of future Monitoring Reports be reduced from four times a year to twice a year, (2) future Monitoring Reports be released in January and July of each year through 1992, and (3) that the frequency of bypass reports from the regional Bell companies and GTE be reduced from twice a year to once a year, to be filed by the end of April of each year through 1992.[2] In support of this proposal to reduce the frequency of monitoring and bypass reports, the Joint Board explained that: unnecessary paperwork should be eliminated from the monitoring process; the NTS recovery program has not produced any harmful result to date; no urgent matters requiring frequent reports are pending; there are no further changes in the NTS recovery program that are designed to provide additional deterrence to bypass; and, at present, the only data received more often than semi-annually are penetration data (received three times a year and reported separately in subscribership reports), price index data (available monthly from the Bureau of Labor Statistics), and aggregate usage and pool data (received monthly from the National Exchange Carrier Association).[3]

II. SUMMARY OF COMMENTS

2. In response to a Public Notice[4] requesting comments on these recommendations, five parties submitted comments: the BellSouth Telephone Companies (BellSouth), GTE Service Corporation (GTE), Metropolitan Fiber Systems, Inc. (MFS), the Public Service Commission of the District of Columbia (DSPSC), and the United States Telephone Association (USTA). No party filed reply comments.

3. BellSouth states that the NTS recovery program, including the subscriber line charge (SLC) increases, has furthered the attainment of this Commission's objectives of prevention of uneconomic bypass, preservation of universal service, elimination of service pricing discrimination, and enhancement of network efficiencies. BellSouth favors the Joint Board's proposal to reduce the frequency of the monitoring reports from quarterly to semi-annually and to require the submission of future bypass reports at the rate of one per year. It asserts that implementation of the final SLC increase will doubtlessly lessen the impact of SLCs on continuing subscribership and bypass trends, and there are no matters pending which might necessitate more frequent reporting. It says the proposed change is consistent with other Commission reporting requirements and will alleviate the administrative burdens the current schedule imposes on submitting companies, this Commission and other interested parties. It notes that the continuation of an open docket provides an assurance that matters of concern will receive the timely attention of the Joint Board, independent of the frequency of the reports. It urges this Commission to adopt the findings of the *Second Study and Report* in their entirely and to approve the proposed changes in the frequency of the monitoring and bypass reports.

4. GTE supports the Joint Board's recommendation to reduce the frequency of the monitoring and bypass reports. It asserts that reducing the frequency of the monitoring and bypass reports will provide administrative relief to the Joint Board and will not diminish the accuracy of monitoring the NTS recovery program. It concurs with the view, expressed in USTA's comments, that we eliminate the jurisdictional shift report used to monitor the impact of the 1988 separations changes in 1990, since the Commission has not implemented any separation changes since 1988.

5. MFS, an alternate service provider, operating fiber optic networks for use by interexchange carriers and end users, contends that the bypass reports filed to date in this docket are so inconsistent, imprecise and undocumented as to preclude anyone from drawing any rational conclusions about the extent of bypass or its impact on the Bell companies' and GTE's revenues. MFS asserts that the Bell companies and GTE use highly subjective standards to identify and measure bypass and present biased, one dimensional assessments of the extent and impact of bypass. It argues that the bypass reports generally fail to differentiate between instances in which users employ bypass alternatives solely due to local exchange carrier (LEC) pricing, and those situations in which users employ alternative facilities because comparable service would be unavailable or would require special construction if ordered from a LEC. It maintains that the reports tend to aggregate economic and uneconomic bypass, and fail to identify the reasons for bypass. It says that factors other than LEC prices, such as security, control, quality, and route diversity, are material considerations for many users who elect to bypass LEC facilities. It argues that the bypass reports fail to account in any meaningful way for this phenomenon.

6. In addition, MFS contends that the LECs utilize idiosyncratic methods to estimate the amount of switched access minutes of use lost to bypass, and often fail to identify material assumptions used to derive those estimates. It argues that the Bell companies' subjective approaches have yielded data that appear to overstate minutes of use and revenues lost to bypass, but since the measurement criteria employed in preparing the bypass reports are not uniform, it is impossible to determine with reasonable certainty whether this is the case. It cites

comments previously filed in the docket by MCI Communications Corporation to support these statements.[5] MFS submits that, rather than merely reducing the frequency of these reports, this Commission should either prescribe meaningful reporting guidelines or eliminate the bypass reports altogether.

7. DCPSC says that now that the final increment of the NTS recovery program has been put into place, the need for continued Joint Board vigilance against adverse consequences is paramount. It submits that this vigilance may be reduced as a result of a decrease in the frequency in the reports. It argues that the Joint Board presents no evidence to demonstrate that no future harm will occur, and that it would be impossible at this time to make such a showing. DCPSC urges that the Joint Board's recommendation to reduce the frequency of the monitoring reports be denied. It suggests that, if the frequency is reduced, this Commission should not alter the reporting format in order to permit parties to conduct historical reviews of the data should they so desire. DCPSC contends that the efforts concerning the reporting of bypass have resulted in unreliable data which have not justified the further implementation of the NTS recovery program. It maintains that the Joint Board's focus should be on ensuring that accurate and verifiable data are being gathered and reported, rather than attempting to limit the frequency of the reporting of that data. It asserts that the recommendation to reduce the frequency of the bypass reports is contrary to the Joint Board's assessment that the record has not yet been fully developed concerning bypass. It observes that the reduction of the frequency of the bypass reports to once a year would create a one year delay before additional information could be analyzed to determine the extent of bypass and what, if any, impact that may have as a result of the fully implemented NTS recovery plan. It requests that the frequency of the bypass reports not be reduced.

8. USTA supports the Joint Board recommendations to reduce the frequency of the monitoring and bypass reports. It says that, due to the timing of the annual cost studies, the quality of the network usage data submitted by the National Exchange Carrier Association could be improved if filed so that it could be included in the July report (beginning in 1990). It observes that the monitoring reports have provided valuable information regarding the impact of the NTS recovery program and the simplification and conformance of the separations manual. It argues that simply reducing the frequency of the reports will not diminish the Joint Board's ability to continue its monitoring responsibilities and will in no way lessen the value of the reports. It contends that reducing the frequency of the bypass reports should not be interpreted to mean that bypass is no longer a problem. It assures that LECs currently providing data will continue to cooperate with the Joint Board staff to provide reliable data. It states that reducing the frequency of the reports will provide administrative relief for the limited resources of the Joint Board staff.

9. USTA suggests that this Commission also consider eliminating the jurisdictional shift report in 1990. It notes that the report was initiated to assess the impact of the separations changes adopted by this Commission and implemented by carriers in 1988. It asserts that data regarding these changes and any impact will be reflected in the 1989 report, and that no changes will occur in 1989 which will require the release of a 1990 report. It maintains that, because this proceeding is an open docket, the Joint Board can seek additional data if deemed necessary after an examination of the 1989 data is completed.[6]

III. DISCUSSION

10. We generally endorse the Joint Board's *Second Study and Report*, and we implement their recommendations to change the frequency and timing of the monitoring and bypass reports, effective immediately. Thus, the next monitoring report will be released in July 1989, with subsequent reports following every six months through July 1992, and the next bypass reports are to be filed by the regional Bell holding companies and GTE by the end of April 1990, with subsequent reports to be filed annually through April 1992.

11. We agree with BellSouth, GTE, and USTA that the reduction in the frequency of the reports will result in administrative relief by reducing unnecessary paperwork for this Commission, the Joint Board, and the industry. We note that past monitoring reports for March and September have been shorter and have contained less new information than the June and December reports. Thus, elimination of the March and September reports will have minimal impact and will free personnel resources to allow more analysis of the data. The elimination of those two reports does not imply, as DCPSC fears, any diminution in the vigilance of our monitoring program. On the contrary, by shifting resources from compiling reports to analyzing data, it will increase that vigilance. The shifting of the remaining two reports to July and January will allow closer scrutiny of the reports before they are released, because they will no longer be caught in the paperwork logjam that normally occurs at the end of each quarter. No change in the basic structure of the reports is being contemplated.

12. In addition to providing administrative relief by reducing unnecessary paperwork, we anticipate that a reduction in the frequency of the bypass reports will allow us to devote more resources to improving the quality of those reports. As the Joint Board observed in its *Second Study and Report*, the record in this proceeding has not yet been fully developed concerning bypass.[7] Even the LECs making the reports have admitted that they lack the required information from bypass users and providers to make precise estimates of bypass. As MFS notes, there have been numerous comments in this docket criticizing the quality of the bypass reports. However, the criticisms generally fail to make specific alternative suggestions as to how bypass should be measured. In its *Second Study and Report* the Joint Board invited bypass users and providers to submit information that would enable a better evaluation of the LECs' assumptions.[8] It found that the basic format of the bypass reports, as developed by its staff after extensive public comment, is appropriate, but it recognized that improvements may be possible.[9] It asked its staff to review issues related to bypass and to develop any desirable modifications in the procedures for estimating bypass or the format of the bypass reports.[10] We likewise ask the Common Carrier Bureau, in consultation with the Joint Board staff, to develop and implement any modifications in the bypass reports that may be appropriate. Because the staff developed the basic format of the reports after extensive comment and consideration, we expect any

revisions will most likely focus on efforts to standardize definitions, assumptions and methodologies used to estimate bypass.

13. As we have done in earlier orders concerning the monitoring program, we remind interested parties that this docket is an open one.[11] Interested parties may submit comments regarding the preferred format of bypass reports at any time. In this regard, we would find useful information from bypass users and providers which will help to evaluate the various definitions, assumptions and methodologies that are used to estimate bypass.[12] We also would find useful specific suggestions of alternative definitions, assumptions and methodologies for estimating bypass.

14. We hereby certify that the Regulatory Flexiblity Act[13] is not applicable to the action taken in this proceeding.[14] In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of this Order in the Federal Register. As part of our analysis of the monitoring program described in this proceeding, however, this Commission has considered the impact of the program on small telephone companies, *i.e.*, those whose study areas serve 50,000 or fewer access lines. The vast majority of small companies will not be affected. Small telephone companies are, of course, invited to file comments on the impact of the monitoring program in the open docket established in this proceeding.

15. The bypass report requirement affects less than 10 respondents per year and is therefore not subject to the requirements of Section 3507 of the Paperwork Reduction Act of 1980, as amended (44 U.S.C. §3507).

IV. ORDERING CLAUSE

16. THEREFORE, IT IS ORDERED that the recommendations regarding the frequency and timing of the monitoring reports and bypass reports contained in the Second Study and Report of the Federal-State Joint Board in CC Docket No. 80-286 adopted March 16, 1989, are ADOPTED and are effective immediately upon adoption.[15]

17. IT IS FURTHER ORDERED that the number of copies of comments filed by interested parties shall be determined pursuant to Section 1.51(b) of this Commission's Rules, 47 C.F.R. § 1.51(b).

18. IT IS FURTHER ORDERED, pursuant to Section 1.51 (e) of this Commission's Rules, that parties filing comments shall also serve the persons listed in Appendix A to this order with one copy of their filing.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

DOCKET NO. 80-286 JOINT BOARD MEMBERS

Chairman
Dennis R. Patrick
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, DC 20554

Commissioner
James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, DC 20554

Commissioner
George H. Barbour
New Jersey Board of Public Utilities
2 Gateway Center
Newark, New Jersey 07102

Commissioner
Ronald L. Lehr
Colorado Public Utilities Commission
1580 Logan Street
Denver, Colorado 80203

Commissioner
Edward B. Hipp
North Carolina Utilities Commission
Box 29510
Raleigh, North Carolina 27626-0510
[if hand delivered:
Dobbs Building
430 North Salisbury Street
Raleigh, North Carolina 27602]

Commissioner
James Fischer
Missouri Public Service Commission
Harry S Truman Bldg., 5th Floor
P.O. Box 360
Jefferson City, Missouri 65102

DOCKET NO. 80-286 FEDERAL-STATE JOINT BOARD STAFF

Ronald Choura
Chairman, Federal-State Joint Board Staff
Michigan Pubic Service Commission
6545 Mercantile Way
Lansing, Michigan 48910

Elton Calder
Georgia Public Service Commission
162 State Office Building
244 Washington Street, S.W.
Atlanta, Georgia 30334

Rowland Curry
Texas Public Utility Commission
Suite 400N
7800 Shoal Creek Blvd.
Austin, Texas 78757

Paul Pederson
Missouri Public Service Commission
Harry S Truman Bldg., 5th Fl.
P.O.Box 360
Jefferson City, Missouri 65102

Diane Hockman
Ohio Public Utilities Commission
180 East Broad Street
Columbus, Ohio 43266-0573

Emily Marks
California Public Utilities Commission
505 Van Ness Avenue, Room 4004
San Francisco, California 94102

Michael P. Gallagher
New Jersey Board of Public Utilities
2 Gateway Center
Newark, New Jersey 07102

Carl Hunt
Colorado Public Utilities Commission
1580 Logan Street
Denver, Colorado 80203

Fred Sistarenik
New York Public Service Commission
3 Empire State Plaza
Albany, New York 12223

Joel B. Shifman
Maine Public Utilities Commission
State House Station #18
Augusta, Maine 04333

Robert Capshaw
North Carolina
Utilities Commission
Box 29510
Raleigh, North Carolina
27626-0510
[if hand delivered:
Dobbs Building
430 North Salisbury
Street
Raleigh, North Carolina
27602]

Cindy Z. Schonhaut
Special Counsel,
Federal-State
Joint Board Matters
Accounting and Audits
Division
Common Carrier Bureau
Federal Communications
Commission
Washington, DC 20554
[if hand delivered:
2000 L Street, N.W., Room 257
Washington, DC 20554]

Cynthia Work
Deputy Chief,
Policy Divison
Common Carrier Bureau
Federal Communications
Commission
1919 M Street, N.W.,
Room 544
Washington, DC 20554

Charles Gray
National Association of
Regulatory Utility
Commissioners
1102 ICC Building
Constitution Ave. &
12th St., N.W.
Washington, DC 20044

OTHER FEDERAL STAFF

Alexander Belinfante
Industry Analysis
Division
Common Carrier
Bureau
Federal Communications
Commission
1919 M Street, N.W.,
Room 538
Washington, DC 20554

Peyton L. Wynns
Chief,
Industry Analysis
Division
Common Carrier
Bureau
Federal Communications
Commission
1919 M. Street, N.W.,
Room 538
Washington, DC 20554

Louis Feldner
Industry Analysis
Division
Common Carrier
Bureau
Federal Communications
Commission
1919 M Street, N.W.,
Room 538
Washington, DC 20554

J. Christopher Frentrup
Tariff Division
Common Carrier
Bureau
Federal Communications
Commission
1919 M. Street, N.W.,
Room 518
Washington, DC 20554

James Lande
Industry Analysis
Division
Common Carrier
Bureau
Federal Communications
Commission
1919 M Street, N.W.,
Room 538
Washington, DC 20554

Laurence Povich
Industry Analysis
Division
Common Carrier
Bureau
Federal Communications
Commission
1919 M. Street, N.W.,
Room 538
Washington, DC 20554

Linda Blake
Industry Analysis Division
Common Carrier Bureau
Federal Communications
Commission
1919 M Street, N.W.,
Room 538
Washington, DC 20554

FOOTNOTES

[1] MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket Nos. 78-72, 80-286, and 87-339, FCC 89J-3, Second Study and Report, released March 24, 1989.

[2] *Id.* at paras. 52 and 66.

[3] *Id.*

[4] Public Notice, CC Docket 87-339, DA 89-361, released April 10, 1989. Comments were due May 1, 1989, and reply comments May 22, 1989.

[5] Excerpts of MCI's comments appear in the March 1989 Monitoring Report at 102-103.

[6] The requests by USTA and GTE to reduce the frequency of reports concerning jurisdictional shifts in revenue requirements are being addressed in a separate order related to that issue. We will therefore not address those requests in this order.

[7] Second Study and Report at para. 63.

[8] *Id.* at para. 65.

[9] *Id.*

[10] *Id.*, at para. 63 and 65.

[11] *See* Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 2 FCC Rcd 5266 (para. 5) (1987).

[12] These definitions, assumptions and methodologies are summarized by USTA, and appear in the December 1988 Monitoring Report at 348-351.

[13] 5 U.S.C. §601, et seq.

[14] Because of the nature of local exchange and access service this Commission concluded that small telephone companies are dominant in their fields of operation and, therefore, are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth therein. We are, nevertheless, committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

[15] This Order is adopted pursuant to Section 4 (i) and 4 (j), 201, 202, 203, 403, and 410 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (i) and (j), 201, 202, 203, 403, and 410.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Correction of Part 74 of
Commission's Rules

ORDER

Adopted: June 30, 1989; Released: July 12, 1989

By the Chief, Mass Media Bureau:

1. By this *Order*, the Commission amends its Rules to correct oversights that occurred as a result of previous amendments made to Part 74 relating to aural broadcast auxiliary station rules. In the *Second Report and Order in Gen. Docket 82-334*, 50 FR 48599 (Nov. 26, 1985), the Commission amended, *inter alia*, Section 74.561 relating to frequency tolerances for transmitters using bands 17.7-19.7 GHz and 31.0 to 31.3 GHz, and Section 74.502 concerning frequency bands. In doing so, a footnote was inadvertently deleted from Section 74.502. Additionally, the text of paragraph (a) in Section 74.561, which specified the frequency tolerance applicable to the use of other bands for aural broadcast STL and intercity relay stations, was incorrectly deleted and paragraph (a) reserved.[1] This *Order* amends the rules by reinserting the deleted footnote from Section 74.502 and by specifying a frequency tolerance of 0.005 percent, which previously appeared in Section 74.561 of the rules for the frequency band 944-952 MHz. It also makes several editorial amendments to Section 74.561, such as expressing the frequency band in MHz as opposed to GHz.

2. Because this *Order* corrects errors which currently appear in the Rules and thus is not intended to make any substantive changes which impose additional burdens or remove provisions relied upon by licensees or the public, we conclude for the reasons set forth above, that this revision will serve the public interest. Because it raises no issue upon which comment would serve a useful purpose, we conclude that compliance with the notice, comment, and effective date provisions, generally applicable to rule makings under the Administrative Procedure Act, as well as the requirements of the Regulatory Flexibility Act, is unnecessary here.

3. This amendment is implemented by authority delegated by the Commission to the Chief, Mass Media Bureau, under Sections 0.61 and 0.283 of the Commission's Rules.

4. Accordingly, IT IS ORDERED, That pursuant to Sections 4, 5, and 303 of the Communications Act of 1934, as amended, and Sections O.61 and 0.283 of the Commission's Rules, Sections 74.502 and 74.561 of the FCC Rules and Regulations ARE HEREBY AMENDED as set forth in the Appendix below, effective upon publication in the *Federal Register*.

5. For further information on this *Order*, contact Rita S. McDonald, (202) 632-5414, Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

APPENDIX

47 CFR Part 74 is amended as follows:

1. The authority citation for Part 74 continues to read as follows:

Authority: 47 U.S.C. Sections 154 and 303.

2. Paragraph (a) of Section 74.502 is amended by adding a footnote to read as follows:

Section 74.502 Frequency assignment.

(a) The frequency band 944-952 MHz[1] * * *

[1] NOTE: In addition to this band, stations in Puerto Rico may continue to be authorized on 942.5, 943.0, 943.5, 944.0 MHz in the band 942-944 MHz on a primary basis to stations and services operating in accordance with the Table of Frequency Allocations.

* * * * *

3. Section 74.561 is revised to read as follows:

Section 74.561 Frequency tolerance.

In the bands above 944 MHz, the operating frequency of the transmitter shall be maintained in accordance with the following table:

Frequency band (MHz)	Tolerance as percentage of assigned frequency
944 to 952	0.005
17,700 to 19,700	0.003
31,000 to 31,300	0.03

FOOTNOTE

[1] Subsequently, in *Report and Order in MM Docket No. 85-36*, 102 FCC 2d 940 (1985), the designation of paragraph (a) in Section 74.561 as reserved was removed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-369

In the Matter of

Amendment of Section 73.202(b),	RM-6282
Table of Allotments,	RM-6453
FM Broadcast Stations.	RM-6580
(Mt. Morris and Savanna, Illinois	
Belle Plaine, Maquoketa, Webster,	
City and Winterset, Iowa)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 18, 1989; Released: July 12, 1989

By the Chief, Allocations Branch:

1. At the request of Carroll County Communications, Inc. ("Carroll County"), licensee of Station WCCI(FM), Channel 261A, Savanna, Illinois, the Commission considers herein the *Notice of Proposed Rule Making and Order to Show Cause*, 3 FCC Rcd 4650 (1988), proposing the substitution of Channel 262B1 for Channel 261A at Savanna, and modification of its license to specify operation on the higher class channel. The *Notice* also proposed the substitution of Channel 239A for Channel 263A at Mt. Morris, Illinois, and the modification of Mason Broadcasting Company's ("Mason") construction permit for that channel (BPH-870819NE) in order to accomplish the upgrade at Savanna. In response to the *Notice*, Maquoketa Broadcasting Company ("Maquoketa Broadcasting"), licensee of KMAQ(FM), filed a petition for rule making and counterproposal seeking the substitution of Channel 238C2 for Channel 237A at Maquoketa, Iowa, and the modification of its license to specify the higher class channel (RM-6580). In addition, Gorich Radio Corporation ("Gorich") filed a petition requesting the substitution of Channel 239C2 for Channel 240A at Webster City, Iowa, and the modification of its license for Station KQWC(FM) to specify operation on the higher powered channel, the substitution of Channel 238A for unused and unapplied for Channel 239A at Belle Plaine, Iowa, and the substitution of Channel 242A for Channel 239A at Winterset, Iowa (RM-6453). On our own motion, we have accepted this petition as a counterproposal in this proceeding.[2,3] These proposals are mutually exclusive. The proposed substitution of Channel 239A at Mt. Morris, Illinois, would be short-spaced to Channel 238C2 at Maquoketa, Iowa. The distance between Maquoketa and Mt. Morris is 100.3 kilometers while 105 kilometers is required. The substitution of Channel 238A at Belle Plaine, Iowa, would be short-spaced to Channel 238C2 at Maquoketa, since the distance between Maquoketa and Belle Plaine is 143.1 kilometers while 163 kilometers is required. Carroll County filed comments reaffirming its intention to apply for the channel, if allotted, and to reimburse Mason for the reasonable costs associated with the change of channel at Mt. Morris. Carroll County, Gorich, and Maquoketa Broadcasting filed reply comments. Christian Family Radio ("Christian") filed a petition for reconsideration in this proceeding of the Commission's action returning its request to allot Channel 243C1 to Audubon, Iowa. The Commission found that Channel 243C1 at Audubon would be short-spaced to Channel 242A at Winterset, but that Christian's proposal could not be considered since the time for filing comments had expired prior to the filing of its request.[4]

2. In its comments, Maquoketa Broadcasting proposes the substitution of Channel 238C2 for Channel 237A, and modification of its license accordingly. It states that its petition is mutually exclusive with Carroll County's proposal to substitute Channel 239A for Channel 263A at Mt. Morris as proposed in the *Notice*. However, Maquoketa Broadcasting suggests that the conflict can be resolved if the reference point for the proposed Channel 239A at Mt. Morris is moved 5 kilometers east of its present site or of city reference coordinates. It states that were we to take such action, Mason, the permittee for Mt. Morris, would have a sufficient area within which to locate a transmitter site. Maquoketa Broadcasting further states that the upgrade of its station at Maquoketa would result in a gain area of 6,752 square kilometers and 176,044 persons.

3. Gorich requests the substitution of Channel 239C2 for Channel 240A at Webster City, Iowa, and modification its license. In order to accomplish the channel substitution at Webster City, Gorich also requests the substitution of Channel 238A for unused and unapplied for Channel 239A at Belle Plaine, Iowa, and substitution of Channel 242A for unused but applied for Channel 239A at Winterset, Iowa. Gorich states that the modification of the Belle Plaine allotment from Channel 239A to Channel 238A would require a change in the site coordinates for the allotment to a new site approximately 2.5 kilometers east of the city.

4. Carroll County initially opposed the allotment of 238C2 to Maquoketa since it would be short spaced to the Channel 239A Mt. Morris transmitter site. However, it later supported Maquoketa Broadcasting's proposal that the reference point for Channel 239A at Mt. Morris, Illinois be changed to a location 5 kilometers east of Mt. Morris since it would allow the allotment of Channel 262B1 to Savanna as well as Channel 238C2 to Maquoketa. However, Carroll County states that if Maquoketa Broadcasting's proposal is adopted to site restrict Channel 239A at Mt. Morris any and all costs associated with the Mt. Morris site change should be borne by Maquoketa Broadcasting, and it should be required to state its willingness to reimburse the Mt. Morris permittee for such costs.

5. Maquoketa Broadcasting, in response to Gorich's counterproposal, states that Gorich's Station KQWC(FM) at Webster City can be upgraded to Class C2 if its transmitter site is relocated 12 1/2 miles northwest of Webster City. Maquoketa Broadcasting claims that this would allow the allotment of Channel 239C2 to Webster City in compliance with the Commission's minimum distance separation and city-grade signal requirements while also providing the wide area service sought by Gorich. Maquoketa Broadcasting further claims that the new site restriction will eliminate the need to change the allotment at Belle Plaine, Iowa, and eliminate the mutual exclusivity between its proposal and Gorich's proposal.

6. Gorich, in its reply comments, opposes Maquoketa Broadcasting's proposal to allot Channel 238C2 to Maquoketa. It states that the allotment of Channel 238C2 would preclude the upgrading of both station WCCI(FM) at Savanna, Illinois, and its Station KQWC(FM) at Webster City, Iowa. It recognizes that the Maquoketa Broadcasting proposal is compatible with the upgrading of the Savanna station if the Mt. Morris permittee relocates its transmitter. However, it argues that the grant of the Webster City and Savanna upgrades would better serve the public interest since it will still allow two of the stations to upgrade but without the the costly and burdensome change in the Mt. Morris transmitter site. Gorich also notes that Maquoketa Broadcasting failed to propose to reimburse these costs.

7. Christian in its petition for reconsideration states that there are three alternate channels available for Winterset, Iowa (Channels 258A, 287A and 290A).[5] It contends that the selection of any one of these channels will permit adoption of its proposal to allot Channel 243C1 to Audubon.

8. After reviewing the proposals before use, we believe that all three communities are deserving of a first wide coverage area FM station. However, we are unable to grant all of the the requests. Therefore, our decision will be based on the allotment priorities set forth in *Revision of FM Assignment Policy and Procedures*, 90 F.C.C. 2d 88 (1982), which are:

(1) First fulltime aural service;

(2) Second fulltime aural service;

(3) First local service;

(4) Other public interest matters

§Co-equal weight given on priorities (2) and (3)

In examining the conflicting proposals, we find that the first three priorities do not apply in this case since none of the allotments would provide a first or second fulltime aural service or a first local service. Therefore, we believe it appropriate to base our determination on which proposal should prevail under priority (4), other public interest matters.

9. Priority (4) of the allotment criteria, public interest matters, calls for the Commission to compare the benefits offered by conflicting proposals where the first three priorities do not apply or do not clearly favor any one proposal. In comparing conflicting requests for upgrades, the Commission looks at the additional area and population which each higher class allotment will provide. *See Greenup, Kentucky*, 2 FCC Rcd 4319 (1987), *aff'd. in relevant part*, 4 FCC Rcd 3843 (1989).

10. Therefore, we have carefully reviewed the data submitted to determine which of the three communities would result in new service to the greatest number of people. Carroll County and Gorich failed to submit a gain area study. However, based on a staff study, we have confirmed that the use of Channel 238C2 at Maquoketa would provide service to an additional 167,275 people, and found that Channel 239C2 at Webster City would provide service to an additional 107,836 people, and Channel 262B1 at Savanna would provide service to an additional 79,960 people. Based on the larger population which would receive service (187,796 vs. 167,275) we find that the public interest would be better served by allotting Channel 239C2 to Webster City, Iowa and 262B1 to Savanna, Illinois than by allotting Channel 238C2 to Maquoketa alone. We could not allot 238C2 to Maquoketa and Channel 262B1 to Savanna since this would require the Mt. Morris permittee to relocate its transmitter site. It is Commission policy not to require a station to involuntarily relocate its transmitter site. *See North Charleston, South Carolina*, 47 Fed. Reg. 10560, published March 11, 1982. Maquoketa Broadcasting not only failed to provide the Commission with Mason's consent to relocate its transmitter but also failed to state an intention to reimburse Mason for the cost of the change. *See Brookville and Punxsutawney, Pennsylvania*, 3 FCC Rcd 5555 (1988).

11. In view of the above information we believe the public interest would be better served by granting the modification proposals at Savanna, Illinois, and Webster City, Iowa, since each will provide benefits by improving service and expanding coverage to populations within their proposed primary service contours. In accordance with Section 1.420(g) of the Commission's Rules, we will substitute Channel 262B1 for Channel 261A at Savanna, Illinois, and modify the license of Station WCCI(FM). In order to accommodate the Savanna modification, we will substitute Channel 239A for Channel 263A at Mt. Morris, Illinois, and modify its construction permit (BPH-870819NE). Channel 262B1 can be allotted to Savanna, Illinois, with a site restriction 4.8 kilometers (3 miles) west of the city to meet spacing requirements to Station WLOO(FM), Channel 262B at Chicago, Illinois. Channel 239A can be allotted to Mt. Morris at Mason's construction permit site in compliance with the minimum distance separation requirements.[6] Channel 239C2 will be substituted for Channel 240A at Webster City, Iowa, and the license of Station KQWC(FM) modified, as requested. In order to accommodate the upgrade at Webster City, Channel 238A will be substituted for Channel 239A at Belle Plaine, Iowa, and Channel 258A will be substituted for Channel 239A at Winterset, Iowa. Channel 239C2 can be allotted to Webster City in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.7 kilometers (2.9 miles) west to avoid a short spacing to Station KIFG, Channel 237A, Iowa Falls, Iowa. Channel 238A can be allotted to Belle Plaine in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.3 kilometers (1.4 miles) east to avoid a short spacing to Station KGGO, Channel 235C, Des Moines, Iowa. Channel 258A can be allotted to Winterset in compliance with the Commission's minimum distance separation requirement with no site restriction.[7]

12. Mason Broadcasting Company, permittee on Channel 263A at Mt. Morris, Illinois filed no response to the *Order to Show Cause* as to why its construction permit should not be modified to specify operation on Channel 239A in lieu of Channel 263A. Accordingly, pursuant to Section 1.87 of the Commission's Rules, Mason is deemed to have consented to the proposed modification.

13. Commission policy requires reimbursement to affected stations for the reasonable costs associated with changing frequencies. *See Circleville and Columbus, Ohio* 8 FCC 2d 159 (1967). Carroll County has reiterated its intention to reimburse Mason for its reasonable costs in switching channels.

14. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 28, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Mt. Morris, Illinois	239A
Savanna, Illinois	262B1
Belle Plaine, Iowa	238A
Webster City, Iowa	239C2
Winterset, Iowa	258A

15. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Carroll County Communications, Inc, Station WCCI, Savanna, Illinois IS MODIFIED, to specify operation on Channel 262B1 in lieu of Channel 261A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Gorich Radio Corporation, Station KQWC (FM), Webster City, Iowa IS MODIFIED, to specify operation on Channel 239C2 in lieu of Channel 240A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

17. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Mason Broadcasting Company, Station WRMA(FM), Mt. Morris, Illinois, IS MODIFIED, to specify operation on Channel 239A in lieu of Channel 263A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Contruction Permit (BPH-870819NE) except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with Construction Permit (BPH-870819NE) except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

18. IT IS FURTHER ORDERED, THAT AFM Associates may amend its application for Winterset, Iowa to Specify Channel 258A in lieu of Channel 239A without loss of cut-off protection.

19. IT IS FURTHER ORDERED, That the petition for rule making filed by Maquoketa Broadcasting Company (RM-6580), IS DENIED.

20. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Report and Order* to the licensee of Station KQWC(FM), Webster City, Iowa, and the permittee of Station WRMA(FM), Mt. Morris, Illinois as follows: Mason Broadcasting Company, 1943 Greenview, Northbrook, Illinois 60062.

21. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Report and Order* to the applicant for Channel 239A at Winterset, Iowa as follows: AFM Associates, P. O. Box 736, Myrtle Beach, South Carolina 29577 (BPH-881118MB).

22. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

23. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Belle Plaine, Maquoketa, Webster City and Winterset, Iowa, have been added to the caption.

[2] Public Notice of the Gorich and Maquoketa Broadcasting counterproposals was given on November 14, 1988, Report No. 1758.

[3] Channel 239A was allotted to Belle Plaine and Winterset as part of the omnibus FM rule making in MM Docket No. 84-231. No applications were filed for either community during the window period. There is presently a pending application for Channel 239A at Winterset, Iowa, filed November 11, 1988, after the close of the application filing window (ARN-881118MB).

[4] We will grant the petition for reconsideration to the extent of accepting the pleading as comments herein since it provides the Commission with information regarding other available channels at Winterset, which could allow the allotment of Channel 243C1 at Audubon, Iowa. That portion of Christian's request seeking the allotment of Channel 243C1 to Audubon will not be considered in this proceeding, but will be the subject of a separate *Notice of Proposed Rule Making* (RM-6557). Therefore, the Oppositions to Christian Family's Petition for Reconsideration filed by Gorich, Wireless, and Christian's response are moot and will not be considered herein.

[5] A staff engineering analysis confirms that Channel 258A can be allotted to Winterset in compliance with the Commission's minimum distance separation requirements at the application site.

[6] The coordinates for Channel 262B1 at the restricted site are North Latitude 42-07-49 and West Longitude 90-09-05, and the coordinates for Channel 239A at Mt. Morris are North Latitude 42-04-14 and West Longitude 89-27-04.

[7] The coordinates for Channel 239C2 at Webster City are North Latitude 42-27-20 and West Longitude 93-52-35. The coordinates for Channel 238A at Belle Plaine are North Latitude 41-54-15 and West Longitude 92-15-02. The coordinates for Channel 258A at Winterset are North Latitude 41-19-54 and West Longitude 94-00-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-462

In the Matter of

Amendment of Section 73.202(b), RM-6432
Table of Allotments,
FM Broadcast Stations.
(Central, New Mexico)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 26, 1989; Released: July 12, 1989

By the Chief, Allocations Branch:

1. At the request of C. N. Morris (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 5730 (1988), proposing the allotment of Channel 237C2 to Central, New Mexico, as the community's first local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted.

2. Channel 237C2 can be allotted to Central in compliance with the Commission's minimum distance separation requirements without a site restriction.[1] Mexican concurrence has been received since Central is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

3. We believe the public interest would be served by allotting Channel 237C2 to Central, New Mexico, since an interest has been expressed in providing the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 28, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Central, New Mexico	237C2

4. The window period for filing applications will open on **August 29, 1989**, and close on **September 28, 1989.**

5. IT IS FURTHER ORDERED, That a copy of this *Report and Order* shall be sent by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Double Eagle Broadcasting, Station KJJJ, 6356 N. Cam. Padre Isadora, Tucson, Arizona 85718.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 32-46-30 and West Longitude 108-09-18. The required separation is met based on the Commission's action upgrading Station KJJJ, Clifton, Arizona, from Channel 237A to Channel 271C, pursuant to MM Docket 85-334. On December 10, 1986, Double Eagle Broadcasting, permittee of Station KJJJ, submitted an application for a construction permit specifying Channel 271C (BMPH-861210ID).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-541

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-6472
FM Broadcast Stations.
(Grinnell, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 21, 1989; Released: July 12, 1989

By the Chief, Allocations Branch:

1. At the request of Blair Broadcasting Corporation (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 7051 (1988), proposing the substitution of Channel 294C2 for Channel 294A at Grinnel, Iowa, and the modification of its construction permit for Station KICL-FM to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 294C2 for Channel 294A at Grinnell, Iowa, since it could enable Station KICL-FM to expand its coverage area. As proposed, we shall also modify Station KICL-FM's construction permit to specify operation on the new channel. Channel 294C2 can be allotted to Grinnell in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.1 kilometers (5.1 miles) northeast to avoid a short-spacing to the Channel 295C2 allotment at Osceola, Iowa, and the outstanding construction of Station KJJC for use of that channel.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 28, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Grinnell, Iowa	294C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Blair Broadcasting Corporation for Station KICL-FM, Grinnell, Iowa, IS MODIFIED to specify operation on Channel 294C2 in lieu of Channel 294A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-47-59 and West Longitude 92-39-29. The *Notice* specified a site at coordinates 41-50-15 and 92-43-50, 10.3 kilometers (6.4 miles) northwest. While these coordinates protect Station KJJC's construction permit site, the Commission inadvertently failed to also protect the allotment itself. Therefore, the reference coordinates for Channel 294C2 at Grinnell have been changed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-575

In the Matter of

Amendment of Section 73.202(b), RM-6405
Table of Allotments,
FM Broadcast Stations.
(Englewood, Ohio)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 26, 1989; Released: July 12, 1989

By the Chief, Allocations Branch:

1. At the request of LC Communications (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 7263 (1988), proposing the allotment of Channel 233A to Englewood, Ohio, as the community's first local FM service. Petitioner, Morbak Communications and James W. Johnson filed comments supporting the proposed allotment and stating their intention to apply for Channel 233A, if allotted.

2. Channel 233A can be allotted to Englewood in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.6 kilometers (2.2 miles) north to avoid a short-spacing to Station WLAP-FM, Channel 233C1, Lexington, Kentucky, and to Station WOFX, Channel 235B, Fairfield, Ohio.[1] Canadian concurrence in the allotment has been received since Englewood is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by allotting Channel 233A to Englewood, Ohio, since it could provide the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 28, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Englewood, Ohio	233A

4. The window period for filing applications will open on **August 29, 1989,** and close on **September 28, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 39-54-34 and West Longitude 84-17-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WALTER P. FABER, JR. File No. BMPH-880709IG

For Modification of
Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 1989; Released: July 13, 1989

By the Commission:

1. The Commission has before it the Petition for Reconsideration filed by Walter P. Faber, Jr. ("Faber").[1] Faber, permittee of FM Station KQMB, Channel 274C, Midvale, Utah, requests reconsideration of the October 21, 1986 action dismissing the captioned application to increase effective radiated power, increase antenna height above average terrain and relocate the KQMB transmitter, and denying Faber's request for a waiver of Section 73.207 of the Commission's Rules. Faber subsequently filed a supplement to his reconsideration petition on May 25, 1988.[2]

BACKGROUND

2. The site specified in the captioned application is 18 kilometers from the transmitter site of Station KTLE-FM, Channel 221A, Tooele, Utah. Inasmuch as Section 73.207(b) provided for a 32 kilometer separation between these two stations, Faber requested a waiver of that provision.[3] In denying the waiver request, the Acting Chief, FM Branch, Audio Services Division, indicated that Faber failed to make a threshold showing that no suitable fully-spaced sites are available and that the proposed KQMB site is the least short-spaced site available. The denial letter informed Faber that he could not employ a directional antenna to avoid an intermediate frequency ("IF") separation requirement. Faber was further informed that since the existing KQMB site was sufficient to provide complete coverage of Midvale, improved coverage did not justify a waiver. Finally, the letter indicated that operating convenience and economic advantage, in and of themselves, did not warrant a grant of his waiver request.

3. In his petition for reconsideraton, Faber asserts that use of the proposed site will enable KQMB to provide a significantly better signal to Midvale while increasing by 24 percent the population served. According to Faber, these benefits by themselves would significantly advance the public interest. Further, he asserts that the proposed relocation would reduce the cost of the KQMB studio-transmitter link and other technological complications. Faber maintains that there is no fully-spaced site comparable to the proposed one. He argues that inasmuch as there would be no overlap of the 20 mV/m contours for KTLE and KQMB, the objective of Section 73.207(b) would be satisfied. Faber notes that prior to submitting his application, he was advised by qualified engineers that the Commission "traditionally" waived the IF spacing requirements upon a showing of improved service and no 20 mV/m contour overlap and that unidentified FM Branch engineering personnel had confirmed to him that the lack of such overlap is considered in ruling upon a waiver request. Thus, Faber claims that the Commission has "regularly" waived the IF standards where applicants proposed to improve service and where the 20 mV/m contour overlap could be avoided and cites several instances in which waivers were granted under such circumstances. Faber therefore asserts that the Bureau's reference to a threshold showing requirement under these circumstances contravened Commission policy and practice. Referring to Section 73.316 of the Rules, he asserts that the Commission itself has given public notice that directional antennas may be used to avoid short-spacings. Further, Faber states that, contrary to the Bureau's letter, improved service as well as operational and economic efficiencies have been relied on by applicants seeking waivers in the past and that the Commission and its staff have not found even those factors necessary once lack of 20 mV/m contour overlap was established. Faber claims that with the exception of *John Lamar Hill*, 70 FCC 2d 153 (Rev. Bd. 1978), the precedent cited by the Bureau in dismissing his application did not concern IF short-spacing. Finally, Faber claims that the instant case may be distinguished from *John Lamar Hill* because that case involved denial of a waiver where the applicant failed to show that the 20 mV/m contours would not overlap.

4. Faber argues that in light of the Commission's "long-standing" practice of waiving the IF separation requirement in situations where there would be no 20 mV/m contour overlap, he was entitled to look upon the practice as an expression of Commission policy. Faber also asserts that Commission policy cannot be changed without acknowledgement and explanation and that new policies cannot generally be applied retroactively. Thus, Faber asserts that if the Commission intends to modify its established practice, it must give public notice and limit application of its new policy to prospective situations.

DISCUSSION

5. In 1965, the Commission amended its Rules to establish mileage separation requirements for FM broadcast stations operating on frequencies 53 or 54 channels (10.6 or 10.8 MHz) apart. *See Report and Order* in Docket 15934, *Amendment of Section 73.207, concerning minimum required spacing between FM Broadcast Stations to provide for IF interference protection*, 45 FCC 2541 (1965). In that proceeding, the Commission noted the special character of IF interference which, unlike co-channel and adjacent channel situations, leads to intermodulation interference in FM receivers. Such intermodulation interference can prevent reception of most or all area FM stations. By requiring stations to situate their transmitters specified distances from each other, the geographic areas within which FM receivers are likely to encounter two relatively strong broadcast signals separated by 10.6 or 10.8 MHz is reduced. Like the co- and adjacent channel separation standards, the IF standards are premised not on actual, measured interference, but on the assumption that the most effective and efficient method for minimizing such interference generally is by separating stations by fixed distances to protect stations operating with maximum fa-

cilities from theoretical interference. *See North Texas Media, Inc. v. FCC*, 778 F. 2d 28 (D.C. Cir. 1985). These separation requirements are part of a comprehensive scheme for FM channel allotments.[4] Since 1962, the Commission has allotted FM channels and granted licenses without regard to the concept of protected and interfering contours. *First Report and Order*, Docket 14185, 40 FCC 662 (1962); *Carroll - Harrison Broadcasting, Inc.* 62 FCC 2d 45 (1976); *Greater Media, Inc. (WHEZ)*, 59 FCC 2d 796 (1976). Faber would have the Commission disregard the IF separation requirements in the instant case and grant his application and associated waiver request which is premised on the absence of 20 mV/m contour overlap.[5]

6. The threshold showing regarding availability of fully-spaced sites required of short-spaced applicants has been applied to both adjacent channel and IF spacing waivers. *See John Lamar Hill*, 70 FCC 2d 153 (Rev. Bd. 1978), *affirmed* FCC 81-339, July 16, 1981. In *John Lamar Hill*, the Review Board ruled that the Administrative Law Judge had properly rejected a request for waiver of the IF spacing requirement because the applicant failed to demonstrate that no other suitable sites were available and, in fact, evidence submitted in the proceeding indicated that two fully spaced sites were available. In discussing the showing required of applicants seeking a waiver, the Review Board stated:

> With respect to an existing station, the applicant must meet two threshold tests: (1) that the existing site is unsuitable, and (2) that although suitable sites which comply with the Commission's rules are unavailable, the proposed site is the least objectionable of the sites that are available. [citations omitted]. Assuming these threshold showings are made, the applicant must still establish that waiver would further the public interest. [citation omitted]

70 FCC 2d at 165-166. Because Faber failed to make the threshold showing, his waiver request must fail.[6]

7. Additionally, there has been no change in the Commission's policy and practice regarding IF spacings waivers.[7] As the Commission has recently stated with respect to IF spacing matters:

> meeting or exceeding the required separation distances *continues to constitute the only measure of compliance with § 73.207*. Applicants seeking a waiver of § 73.207 are advised that alleged discrepancies between the separation distances in the revised rule and the contour overlap calculations presumed to underlie them, do not in themselves constitute sufficient grounds for such a waiver. Other factors germane to each individual case (*e.g.* lack of an alternative antenna site) *must* be considered when such waiver requests are evaluated.

Third Report and Order, MM Docket No. 86-144, *Review of Technical Parameters for FM Allocation Rules of part 73, Subpart B, FM Broadcast Stations (IF Distance Separation Requirements)*, FCC 89-62, at n.21 (emphasis added). *See also*, *Notice of Proposed Rule Making*, MM Docket No. 87-121, *Amendment of part 73 of the Commission's Rules to permit short-spaced FM station assignments by using Directional Antennas*, 3 FCC Rcd 1820, n.17 (1988).

8. Faber, however, cites a 1974 FM proceeding in St. Louis, Missouri, in which the Commission granted an IF spacing waiver to the licensee of KKSS-FM (presently KMJM-FM) who proposed to relocate its transmitter to a site short-spaced by 3.1 and 3.5 miles, respectively, to the sites specified in two out of four applications for a new FM facility in St. Charles, Missouri. Apparently, KKSS-FM did not make any showing with respect to the availability of fully spaced sites. Accordingly, Faber asserts that no such showing is necessary in the instant case. We disagree. As previously stated, *John Lamar Hill* (decided four years after grant of the KKSS waiver) clearly articulated the showing required of applicants seeking a waiver of the IF distance separation requirements. To the extent the KKSS waiver suggests a different standard to be applied to IF spacing waivers, that action is hereby expressly overruled.

9. Faber also cites several instances in which waivers of IF spacing deficiencies were granted by the Mass Media Bureau staff in the absence of a threshold showing. To the extent the staff may have deviated from clearly articulated Commission precedent in those situations, those actions were erroneous and are not controlling here. Furthermore, inasmuch as these deviant actions were taken by delegated authority, not by the Commission, we reject Fabers attempt to rely on these cases as establishing a Commission policy on IF waivers which may not be retroactively altered. *See North Texas Media, Inc. v. FCC*, 778 F.2d at 33 ("The initial improvident grant of a[n IF short-spacing] waiver . . ., now described as an error, does not deprive the agency of authority to require future applicants to meet certain standards in order to obtain such a waiver.") Inasmuch as Commission policy was not changed with respect to the threshold showing required of applicants seeking waivers of the minimum distance separation requirements, we reject Faber's assertion that such a change has occurred and that any further change in policy may not be applied retroactively.

10. Faber's assertions that consequential benefits will result from a grant of his waiver request and a move to the proposed KQMB site need not be controverted here. Although the station could well be able to reach a larger audience, this factor, in and of itself, is not sufficient reason to waive the separation requirements absent a showing that the station's existing coverage is patently inadequate. *See Greater Media*, 59 FCC 2d 796. Faber also claims that KQMB will realize operational economies from the proposed modification. While we may not dispute that the financial benefits to KQMB resulting from the proposed modification might free additional funds which could be diverted to enhance programming, that factor would only be properly considered in the context of a determination of the public interest benefits of a waiver *subsequent* to a successful threshold showing. It is only when that threshold is crossed that public interest benefits are taken into consideration.

11. Finally, contrary to Faber's assertion, our rules do not permit use of directional antennas for the purpose of avoiding the minimum distance separation requirements for IF-related stations. Although the rules have recently been amended to allow co and adjacent channel stations to locate their transmitters at sites less than the minimum

prescribed in § 73.207 by using a directional antenna to provide the requisite contour protection, we specifically rejected such a standard for IF-related stations. *See* note 7, *supra*. Thus, we reject Faber's claim that the rules specifically provide for use of directional antennas to avoid spacing deficiencies.

12. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Walter P. Faber, Jr. IS DENIED.[8] IS IS FURTHER ORDERED, That Faber's supplement to petition for reconsideration IS DISMISSED as untimely.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The petition is referred to the Commission pursuant to Section 1.106 (a)(1) of the Commission's Rules.

[2] Faber's supplement was filed approximately six months after the deadline for filing petitions for reconsideration. 47 C.F.R. § 1.106(f) provides that petitions for reconsideration and supplements thereto be filed within 30 days of public notice of the action for which reconsideration is sought. The rule further provides that supplements filed after expiration of the 30 day period will not be considered except upon leave granted pursuant to a separate pleading requesting leave to file and setting forth the grounds therefor. Faber failed to submit such a request. Accordingly, Faber's supplement is untimely and will be dismissed.

[3] Under the new IF Separation requirements set forth in the *Third Report and Order*, MM Docket 86-144, *Review of Technical Parameters for FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations*, FCC 89-62, released April 10, 1989, the required separation between the KQMB and KTLE transmitters is 28 kilometers. Thus, even under the new rules, Faber's proposal is still short-spaced by 10 kilometers.

[4] *See Revision of FM Broadcast Rules, First Report and Order*, 40 FCC 662 (1962); *Revision of FM Broadcast Rules, Second Report, Memorandum Opinion and Order*, 40 FCC 720 (1962); *Revision of FM Broadcast Rules, Third Report, Memorandum Opinion and Order*, 40 FCC 747 (1963).

[5] Furthermore, as noted in the *Notice of Proposed Rulemaking*, MM Docket 86-144, *Review of Technical Parameters for FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations*, 3 FCC Rcd 1661 (1988), the spacings previously required between stations separated by 53 or 54 channels provided different levels of protection which did not necessarily reflect a 20 mV/m contour overlap standard.

[6] The threshold showing has been described extensively in co-channel and adjacent channel short-spacing cases. *Townsend Broadcasting Corp.*, 62 FCC 2d 511 (1976); *Megamedia*, 67 FCC 2d 208 (1978). *See also North Texas Media Inc. v. FCC*, 778 F.2d 28. *But see Calossa Television Corp.*, 3 FCC Rcd 3656 (1988), wherein the Commission waived the minimum distance separation requirement in the absence of a threshold showing because of the "unusual combination of public interest factors presented." *Id.* at 3657. Specifically, the Commission noted that: tower height restrictions at the present site put the licensee at a significant technical and competitive disadvantage; the FAA had restricted tall towers to three areas and the site selected was the least short-spaced of the three areas; the proposal would result in a substantial gain and no loss in the area served and would provide the first off-the-air ABC network service to 34,000 persons; the significant environmental concerns relating to the protection of endangered species; and the use of precision frequency equipment to minimize predicted objectional interference. Similar compelling reasons are not present here to justify a waiver of the IF spacing requirements absent the threshold showing in the context of Faber's application.

[7] The Commission recently adopted rules permitting co and adjacent channel stations to locate their transmitters at sites less than the minimum prescribed in § 73.207 provided that contour protection is demonstrated with the pertinent short-spaced assignments, applications and/or allotments. *See Report and Order*, MM Docket 87-121, *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, FCC 88-406, released February 22, 1989. The Commission, however, explicitly refused to adopt a contour protection standard for short-spaced IF-related stations because of the different characteristics between IF related and co and adjacent channel related interference (*e.g.* IF-related interference impedes reception of all FM stations in the area not just the IF-related stations) and the fact that the technical issues involved in IF-related interference did not receive public comment and scrutiny in MM Docket 87-121. *Id.* at n.1. Because the technical considerations underlying IF distance separation requirements differ from those considered in MM Docket 87-121, the Commission also rejected a contour protection standard in the *Third Report and Order in* MM Docket 86-144, FCC 89-62 at para. 20. Having explicitly rejected a contour protection standard for IF related short-spacings in those two Rule Making proceedings, we believe it would be inappropriate to herein depart from the existing wavier criteria for IF related short-spacings and apply a contour protection standard on an ad hoc basis.

[8] Faber filed a Request for Certification and Consolidation asking consolidation and consideration of this proceeding with Commission action in MM Docket No. 85-304. In view of our action denying Faber's Petition for Reconsideration the Request for Certification and Consolidation is dismissed as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

NORTHERN SOUND PUBLIC RADIO — File No. BPED-860811MJ

For Construction Permit for a New Noncommercial Educational FM Station on Channel 219A in Bellingham, Washington

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1989; Released: July 13, 1989

By the Commission: Commissioner Dennis dissenting and issuing a statement.

1. The Commission has under consideration the above-captioned application of Northern Sound Public Radio (NSPR) for a major amendment to its pending application (File No. BPED-860115MC) for a new noncommercial educational FM station on Channel 217A in Bellingham, Washington. The amendment proposes changing the broadcast channel from 217A to 219A. This major amendment resulted from a request by the Mass Media Bureau (Bureau) that NSPR search for a channel on which its proposed facility would receive less interference from Canadian allocations once those allocations were applied for and the facilities became operational.

2. NSPR's selection of Channel 219A is the culmination of a search which began in 1980 to overcome the severe preclusionary restrictions to FM stations in the Bellingham area caused by the large number of FM channels assigned to Canada under the current *Working Arrangement for the Allotment and Assignment of FM Broadcasting Channels 201-300 Under the Canadian-U.S. FM Broadcasting Agreement of 1947* (adopted September 7, 1984) ("*Working Arrangement*"). Under the *Working Arrangement*, Canada received allocations on numerous channels in the noncommercial band along the western Canadian-American border, thereby assuring interference problems with virtually any proposed U.S. station in the noncommercial band. NSPR's first proposal, submitted informally by letter dated August 12, 1980, was to build a Class C facility on Channel 211. By letter dated November 3, 1980, the then Broadcast Bureau deemed the proposal unfeasible because it would cause unacceptable interference to Canadian allocations and suggested that NSPR instead consider building a low power facility. In response, NSPR proposed to construct a Class A facility on Channel 217 (File No. BPED-860115MC). Although this plan would protect all relevant Canadian allocations and had received Canadian concurrence, the Bureau advised NSPR that, due to its proximity (52.1 km) to the Victoria/Saturna Island, British Columbia (BC), co-Channel 217C allocation, NSPR's proposed facility might receive substantial interference if Canada constructed a station at full facilities on the presently vacant co-channel. The Bureau requested NSPR to search for a channel that would receive less interference from Canadian allocations when fully activated. NSPR then submitted the above-captioned major amendment to build its proposed Class A facility on Channel 219.[1] NSPR's proposed operation on Channel 219 is also subject to interference, due to its proximity (56.6 km) to co-channel Class A station CBYF, Chilliwack, BC, but to a lesser degree than would have resulted from operation on Channel 217.[2] Inasmuch as interference to the reception of NSPR's proposed facility is predicted within its proposed 1 mV/m contour, a condition prohibited by Section 73.509 of the Commission's Rules,[3] NSPR has requested a waiver.[4]

3. The 40 dBu (0.1 mV/m) contour of station CBYF completely encompasses the proposed NSPR 60 dBu (1 mV/m) contour. However, engineering studies provided by the applicant demonstrate that, despite this overlap, there exists an "interference-free" area within the proposed NSPR 60 dBu contour. This interference-free service area encompasses a population of 17,986 persons, which comprises nearly 50 percent of the population within the proposed NSPR 60 dBu contour. In the applicant's exhibits, the Commission's F(50,10) and F(50,50) propagation curves were used to determine the interference-free area. For relatively rough terrain profiles, or for paths with substantial amounts of shadow loss, this technique yields a "worst case" prediction of interference field intensity values (*i.e.*, it tends to predict values higher than those which are likely to be encountered in practice). Since the terrain between the CBYF site and Bellingham is rough and mountainous, the applicant supplemented this analysis by utilizing diffraction loss calculations along paths between CBYF and Bellingham. Using this analysis, the applicant concludes that the actual intererence area produced by CBYF within the proposed NSPR 60 dBu contour is likely to be much smaller, and the interference-free area is likely to be much larger, than the areas depicted in the "worst case" analysis.

4. Waiver of Section 73.509 to the extent requested in this case is warranted only upon the most compelling of justifications. In the instant case, as discussed *supra*, the numerous Canadian allocations in the noncommercial band preclude implementation of any interference-free proposal in the Bellingham area. An exhaustive channel study of the noncommercial band conducted by the Bureau indicates that Channel 219 will receive the least amount of interference of the noncommercial channels.[5] Further, a study of the commercial band performed by the Bureau shows that no channel in the commercial band can be utilized due to short-spacing problems. Given the lack of alternative commercial frequencies and the Canadian preclusion of the noncommercial frequencies, NSPR believes, and we concur, that despite the interference received, Channel 219A is the best possible channel on which NSPR can operate. In addition, the preclusionary effect of NSPR's proposed station is minimal due to Bellingham's severely isolated geographic location.[6] Thus, although we would normally deny waivers of Section 73.509 of this magnitude, due to the extraordinary set of circumstances that exist in this case, we believe that adequate justification exists to warrant a waiver.

5. Accordingly, IT IS ORDERED, That NSPR's request for waiver of 47 C.F.R. Section 73.509 IS GRANTED, and that its application for a new noncommercial educational station on Channel 219A in Bellingham, Washington, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] NSPR's present proposal does not meet the minimum distance spacing requirements of the *Working Arrangement* with respect to co-channel Class A station CBYF, Chilliwack, BC, and to allocations on: co-Channel 219A, Squamish, BC; second adjacent Channel 217C, Victoria/Saturna Island, BC; and second adjacent Channel 221C, Victoria, BC. However, full activation of all three allocations will not cause interference to NSPR's proposed operation on Channel 219A. By letter dated October 14, 1986, Canadian concurrence was granted for the proposed short-spaced operation on Channel 219A, provided that the NSPR interfering contour not extend into Canadian territory. NSPR's proposal meets the Canadian requirement. The 34 dBu contour of the proposed facility does not cross the Canadian border and therefore will not create prohibited interference to either licensed or allocated Canadian facilities.

[2] NSPR's operation on Channel 217 would have been located 52.1 km from a co-channel Canadian Class C allocation, whereas its proposed operation on Channel 219 is located 56.6 km from a co-channel Canadian Class A licensed facility.

[3] Section 73.509(a) provides, *inter alia*, that no educational FM application will be accepted for filing if the requested facility would receive interference within its proposed 1 mV/m contour.

[4] In the *Memorandum Opinion and Order* in MM Docket No. 20735, 50 Fed. Reg. 27954 (1985), the Mass Media Bureau was given authority to waive, when warranted, overlap received by noncommercial educational FM applicants when approximately 10% or less of the proposed service area (1 mV/m contour) is affected. Waiver of greater amounts of overlap received must be approved by the Commission.

[5] As discussed *supra*, NSPR's proposal to operate on Channel 219A, while short-spaced to three Canadian allocations and Class A licensed facility CBYF, Chilliwack, BC, will not receive interference from the allocations even when fully activated and will only receive interference from Class A station CBYF. NSPR's proposal would receive a greater degree of interference if it were to operate on any other channel in the noncommercial band.

[6] To the north and west lies Canada; to the south and southwest lies Puget Sound; and to the east and southeast lies mountainous terrain which is likely to remain sparsely populated.

DISSENTING STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In re: Request for waiver of 47 C.F.R. Section 73.509 by applicant for construction permit for a new noncommercial educational FM station on Channel 219A in Bellingham, Washington

I respectfully dissent from the Commission's grant of this waiver. I sympathize with Northern Sound Public Radio's long-standing struggle to find an acceptable frequency and recognize the value of providing NPR service and other noncommercial programs to Bellingham. Yet, as valuable as the new service might be, the circumstances of this case are not so unusual as to warrant a sweeping waiver of our rules prohibiting contour overlap. The proposed station will provide no first or second aural service, no first or second local service, nor even a first noncommercial educational service. Bellingham currently has two local commercial FM stations and four local AM stations, as well as a noncommercial FM station operated by Western Washington University.

Our rule prohibits *any* overlap of a proposed station's 1 mV/m contour with the 0.1 mV/m contour of another co-channel station. 47 C.F.R. 73.509(a). We have granted waivers of this rule only upon the most compelling of justifications and, generally, for overlaps of less than ten percent. This case, however, presents a 100% overlap: the 1 mV/m contour of the proposed Bellingham station will be entirely encompassed by the 0.1 mV/m contour of a co-channel Class A station in Canada. Allowing such massive contour overlap undermines the integrity of our rules against interference. Therefore, I must reluctantly dissent.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WNHC(AM), New Haven, Connecticut applications for transfer of control

File Nos. BTC-880519EA
BTC-880610ET

ORDER

Adopted: June 27, 1989; Released: July 13, 1989

By the Commission:

1. The Commission has before it an application for review filed by Anthony R. Martin-Trigona ("Martin-Trigona"), seeking review of the Mass Media Bureau's August 30, 1988, dismissal of his pleading filed against the above-captioned applications for transfer of control of station WNHC(AM), New Haven, Connecticut, which were granted on that date.

2. The application for review reiterates arguments raised in Martin-Trigona's dismissed pleading.[1] After a careful review of Martin-Trigona's application for review, we believe that the Bureau's ruling was correct, and that Martin-Trigona has failed to raise any matters sufficient to warrant reversal of that ruling. Therefore, pursuant to Section 1.115(g) of the Commission's Rules, the application for review is denied.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] In addition, Martin-Trigona asserts for the first time that the Mass Media Bureau's ruling is procedurally defective and must be set aside because the ruling official, Larry Eads, Chief, Audio Services Division, is not a lawyer, and therefore lacked authority in this matter. In his capacity as Chief of the Audio Services Division, Mr. Eads was acting on delegated authority to determine the disposition of a contested application for transfer of control. This is within the scope of the authority delegated to the Mass Media Bureau Chief and subordinate officials (irrespective of whether or not such officials are lawyers) pursuant to 47 C.F.R. Sections 0.204 and 0.283. *See The Petroleum V. Nasby Corp.*, 50 RR2d 34 (1981).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 30, 1989

8940-LJ

Released: July 13, 1989

Capital Cities/ABC, Inc.
c/o Joel Rosenbloom
Wilmer, Cutler & Pickering
2445 M Street, N. W.
Washington, D. C. 20037

Gentlemen:

This refers to the request of Capital Cities/ABC, Inc. (Capital Cities/ABC) for a permanent waiver of the Commission's one-to-a-market rule, 47 C.F.R. Section 73.3555(b), to permit the company to retain its current ownership of the following radio and television stations: WABC-TV, WABC(AM) and WPLJ(FM), New York, New York; WLS-TV, WLS(AM), and WYTZ(FM), Chicago, Illinois; KABC-TV, KABC(AM) and KLOS(FM), Los Angeles, California; and KGO-TV, and KGO(AM), San Francisco, California.

In 1985, the Commission approved the merger of Capital Cities Communications and American Broadcasting Companies, Inc., and granted a temporary waiver of the one-to-a-market rule to permit continued common ownership of the above radio and television stations for a period of 18 months following consummation of the merger. *Capital Cities Communications Inc.*, 59 RR 2d 451 (1985). That merger was consummated on January 3, 1986. It was anticipated that Capital Cities/ABC would come into compliance with the Commissions Rules by divesting itself of the conflicting interests within that period of time. Prior to the required divestiture date (July 3, 1987), however, the Commission instituted a Rule Making proceeding in which it proposed to amend the multiple ownership rules and permit common ownership of television and radio stations in the larger television markets. *Notice of Proposed Rule Making*, MM Docket No. 87-7, 2 FCC Rcd 1138 (1987). In view of the pending Rule Making, Capital Cities/ABC requested that the Commission extend the divestiture requirement for a period of up to six months after the effective date of the Commission's action in MM Docket No. 87-7. The Commission granted the request on April 6, 1987. *Capital Cities/ABC, Inc.*, 2 FCC Rcd 2539.

Subsequently, the Commission concluded in MM Docket 87-7 that it would look favorably upon waiver requests involving radio and television station combinations in the top 25 television markets where there will be at least 30 separately owned, operated and controlled broadcast licensees after the proposed combination, as determined by counting full-service television licensees in the relevant ADI television market and radio licensees in the relevant television metropolitan market. *Amendment of Section 73.3555 of the Commission's Rules, Second Report and Order*, 4 FCC Rcd 1741 (1989) (*Second Report and Order*).[1] The Commission indicated, among other things, that: (1) it would use the most recent *Arbitron Ratings Television ADI Market Guide* in determining the top 25 ADI television markets, the parameters of the particular ADI television market and the relevant television metropolitan market for each prospective combination; (2) it would rely on data contained in its most recent ownership records in order to determine the number of television stations in the relevant ADI television market and the number of radio stations located in the relevant television metropolitan market; (3) it would count only stations on the air, operating pursuant to a license or construction permit; and (4) it would use the attribution provisions of its local multiple ownership rules to determine the number of separately owned, operated, and controlled broadcast licensees in the relevant television or metro market. *Second Report and Order*, 4 FCC Rcd at 1751.

In support of its waiver, Capital Cities/ABC points out that the New York, Los Angeles, Chicago and San Francisco television markets are ranked first, second, third and fifth, respectively, in the country by the most recent available *Arbitron Ratings Television ADI Market Guide*. It also submitted a tabulation of the separate broadcast owners in each market, prepared in accordance with the standards prescribed by the Commission. The tabulation shows that there are 94 separate broadcast voices in New York, 79 in Los Angeles, 105 in Chicago and 57 in San Francisco. Capital Cities/ABC contends that, since these figures far exceed the number of required "voices" set out in the *Second Report and Order*, a grant of the requested waiver is warranted.

Herman W. Mathews, a plaintiff in a civil suit against Capital Cities/ABC, filed a statement opposing any Commission approval of the waiver request.[2] In November 1986, Mr. Mathews filed a racial discrimination complaint with the Equal Employment Opportunity Commission (EEOC) against Capital Cities/ABC in connection with his employment at station WTVD-TV, Durham, North Carolina, which is licensed to Capital Cities/ABC. Mr. Mathews opposes the grant of the waiver request solely on the basis of allegations involving his complaint with the EEOC. We note that Mr. Mathews, on May 15, 1987, advised the Commission's Mass Media Bureau's Equal Employment Opportunity Branch (EEO Branch) of his intent to file a civil law suit against Capital Cities/ABC, and asked if he was approaching his concerns in the correct manner. By letter dated June 2, 1987, the EEO Branch informed Mr. Mathews that he was handling the matter correctly, and that it was the Commission's policy to defer action in cases involving equal employment complaints with broadcast licensees, when the complaint had already been filed with other governmental agencies and/or courts established to enforce such laws. The EEO Branch also stated that when a final determination had been rendered by either the EEOC or the court, it would consider his complaint and take whatever action was deemed appropriate at that time. Since no final decision has been rendered yet regarding Mr. Mathews' complaint, we do not address his allegations in our consideration of Capital Cities/ABC's waiver request.

When the Commission adopted the *Second Report and Order*, it concluded that it would look favorably upon waiver requests that meet the standard noted above. The Commission stated that it would not scrutinize these ap-

plications for economic efficiencies because it had already determined that such efficiencies generally exist. Further, the Commission concluded that the benefits of permitting radio-television combinations in the top 25 markets having many competing voices generally would not undermine the benefits flowing from the Commission's traditional pro-competitive and diversity policies. *Id.* at 1751. The information submitted by Capital Cities/ABC, as noted above, clearly meets the standard adopted by the Commission.

Accordingly, in view of the foregoing, your request for a permanent waiver of the Commission's one-to-a-market rule, Section 73.3555(b), to permit Capital Cities/ABC to retain its common ownership of the television and radio stations in New York, Los Angeles, Chicago, and San Francisco, IS GRANTED.

The Mass Media Bureau shall mail copies of this By Direction Letter to the parties to this proceeding.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

By the Commission:
Commissioner Dennis concurring and issuing a statement.

FOOTNOTES

[1] The amended rule became effective on March 31, 1989.

[2] Also, Consumer Federation of America and Telecommunications Research Action Center (CFA/TRAC) filed joint comments in response to the waiver request. CFA/TRAC, however, do not oppose the instant waiver request because they believe that Capital Cities/ABC has set forth a clear case for waiver.

CONCURRING STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Request of Capital Cities/ABC, Inc., for a Permanent Waiver of the Commission's One-to-a-Market Rule.

In this proceeding, Capital Cities/ABC, Inc. ("ABC") seeks a permanent waiver of our one-to-a-market rules so that ABC can continue to operate radio-TV combinations in four markets: New York (market #1), Los Angeles (#2), Chicago (#3), and San Francisco (#5). In our recent *Report and Order* reviewing the one-to-a-market rule, I suggested a two-tier approach. I said the Commission should have repealed the rule in major markets with at least 10 television stations, 45 separate owners, and 65 broadcast stations. In all other markets, we should not only retain the rule, but enforce it strictly. In those markets, we should require waiver applicants to make a compelling showing as to why the public interest would be served by a waiver. *See* Separate Statement of Commissioner Patricia Diaz Dennis in MM Docket No. 87-7 (released April 10, 1989).

New York, Los Angeles, Chicago, and San Francisco all meet the 10-45-65 test. Therefore, I concur in the decision to grant ABC's request.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHERN NEW ENGLAND TELEPHONE COMPANY

Petition for Review of Accounting Orders Imposed in Tariff Investigations

AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND THE BELL SYSTEM OPERATING COMPANIES

Revisions to Tariff F.C.C. No. 9 — Transmittal Nos. 43, 45, 53, and 56

AMERICAN TELEPHONE AND TELEGRAPH COMPANY & ASSOCIATED BELL SYSTEM COMPANIES — **DOCKET 21499**

Offer of Facilities for Use by Other Common Carriers

MEMORANDUM OPINION AND ORDER

Adopted: June 26, 1989; Released: July 13, 1989

By the Commission:

I. INTRODUCTION

1. Southern New England Telephone Company (SNET) filed a petition for review (Petition) on August 14, 1987, requesting that this Commission review certain accounting orders for the purpose of determining whether the accounting orders should be terminated. These orders are listed in the Appendix to this Order. On August 26, 1987, this Commission released a Public Notice inviting comments on SNET's petition.[1] In response, MCI Telecommunications Corp. (MCI) filed a motion on October 28, 1987, entitled "Motion To Consider Accounting Orders in the Proceedings In Which They Have Been Entered" (MCI Motion). Other comments were filed on February 16, 1988, and replies were filed on April 4, 1988.[2] The commenters generally support SNET's request that this Commission review the accounting orders described in the SNET petition. We agree with the parties that the orders should be reviewed and we intend to conduct that review in this Order and three subsequent Orders. In this Order, we initiate that review by terminating three accounting orders which were imposed during this Commission's investigation of Exchange Network Facilities for Interstate Access (ENFIA) tariffs. We also terminate those investigations.[3]

II. BACKGROUND

2. All the accounting orders referenced by SNET relate to telecommunications rate changes that became effective between 1968 and 1982. The accounting orders were entered pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a). That provision of the Act authorizes this Commission to enter an order in connection with certain tariff investigations requiring a carrier to keep an accurate account of amounts received from certain charges "specifying by whom and in whose behalf such amounts are paid, . . ."

3. SNET asserts that these accounting orders[4] remain in an "open status" as a result of investigations that were initiated before the Bell System divestiture. According to SNET, however, the ensuing years have brought major changes in the regulatory environment. The divestiture by AT&T of its local exchange operations has had the most profound effect on these orders. SNET Petition at 3. Therefore, SNET contends that while these accounting orders are technically still in effect, the accounting orders have in fact been nullified by subsequent events. *Id.*

4. According to SNET, the accounting orders it lists should be terminated because: the relevant rates have not been in effect for a number of years; some of the affected services have been discontinued (MTS and WATS are still being offered while TELPAK and ENFIA rates are no longer available); it is costly in terms of time and money to maintain the records; there is little likelihood that refunds will ever be made; and these accounting orders have outlived their regulatory purpose. SNET states that while it is seeking to terminate a number of these orders, it stands ready to make any refunds this Commission deems necessary to conclude these proceedings. *Id.* at 1-4.

III. SUMMARY OF PLEADINGS

5. The commenters agree with SNET that the investigations and accounting orders in question should be reviewed with the purpose of terminating those that no longer serve any regulatory purpose. Many of the parties agree with SNET that it is costly in terms of time and money to maintain these accounting records for such a long period of time. Ameritech, for example, states that because the accounting methods used at the time the accounting orders were first entered are no longer in use, special procedures must be used to maintain these data which are not part of its normal recordkeeping process. Ameritech Comments at 2. A number of other parties also state that it is difficult to maintain accounting records for such long periods of time. *See, e.g.*, Cincinnati Bell Comments at 2; Contel Comments at 2; USTA Comments at 4.

6. Several of the parties argue that there is no reason to continue to maintain these records because there is little likelihood of refunds. Ameritech Comments at 3; BellSouth Comments at 2. USTA states that even if refunds were ordered, it would be difficult, if not impossible, to determine which parties should receive these refunds and how much these parties should receive. USTA Comments at 3. *See also* Ameritech Comments at 5; BellSouth Comments at 2. Moreover, USTA asserts that no interested parties have come forward to claim refunds or to offer any data to support such a claim. USTA Comments at 5. In addition, BellSouth and USTA allege that the statute of limitations in Section 415(c) of the Communications Act, 47 U.S.C. § 415(c), precludes the

recovery of damages two years after the cause of action accrues unless a complaint is filed. BellSouth Comments at 3; USTA Comments at 6.

7. A number of parties contend that, due to changes in the structure and regulation of the telecommunications industry, the services which are the subject of the investigations are no longer being offered and the tariffs no longer in effect. AT&T alleges that the ENFIA investigations and related accounting orders can be terminated due to the fact that there is no basis upon which to award prospective refunds because ENFIA tariffs have been replaced by the access charge system, and no basis to award retroactive refunds because none of the carriers was able to show that it was overcharged pursuant to the ENFIA tariffs. AT&T Comments at 3.[5] Other parties make more generalized statements that the orders in question can be terminated on the basis that the rates are obsolete, pertain to pre-divestiture proceedings, and have not been in effect for years. BellSouth Comments at 2; Contel Comments at 2.

8. MCI raises the only objections to the petition in its Motion. It contends that the only appropriate forum in which to resolve these accounting orders is within the proceeding in which they were entered and that the accounting orders cannot be terminated without an examination of the underlying investigations. MCI Motion at 1-3. The fact that SNET and the commenters believe that refunds are unlikely because the rates subject to the accounting orders are no longer in effect is not a sufficient basis for terminating the accounting orders, according to MCI. *Id.* at 4-5.

9. The reply comments, for the most part, address only MCI's motion. SNET and BellSouth allege that MCI mischaracterizes SNET's petition. SNET states that it does not suggest that this Commission terminate the accounting orders without reviewing the underlying proceedings. SNET contends that its petition makes it clear that this Commission should review the investigation and accounting orders and either specifically vacate or continue each one as appropriate. SNET Reply at 12. *See also* SWB Reply at 2; BellSouth Reply at 3. MCI maintains in its reply that it does not oppose the termination of these investigations and accounting orders, but if they are terminated, then it should be on the basis of facts pertinent to each proceeding and not for the broad reasons cited by the parties, such as administrative burdens or that refunds are unlikely. MCI Reply at 1-3. Finally, MCI maintains that the statute of limitations set out in Section 415 (c) of the Communications Act does not apply to investigations but applies to actions at law and complaints. *Id.* at 5.[6]

IV. DISCUSSION

10. We agree with MCI that the accounting orders at issue cannot be summarily terminated without an examination of the underlying investigations. SNET has requested that we reexamine the underlying investigations to determine whether the accounting orders should be terminated. Moreover, SNET and MCI are correct that these accounting orders relate to a large number of complex proceedings which span many years and cover numerous services. AT&T groups the accounting orders into four categories: (1) charges incurred by Other Common Carriers (OCCs) pursuant to ENFIA; (2) across-the-board rate increases filed between 1976 and 1981 for AT&T's switched and private line services; (3) investigation of AT&T's private line tariffs, specifically AT&T's compliance with the Fully Distributed Cost (FDC) methodology in Docket No. 18128; and (4) AT&T WATS and 800 Service tariffs filed during the 1970's and early 1980's. *See* AT&T Comments at i-ii. This order examines the first category.

11. The first accounting order referenced by SNET was initiated at the time AT&T, on behalf of the Bell System Operating Companies (BSOCs), filed revisions to BSOC Tariff No. 9 through Transmittal Nos. 43 and 45. BSOC Transmittal Nos. 43 and 45, ENFIA (Trunk Terminations), Mimeo No. 1425, released Jan. 6, 1982 (*January 1982 ENFIA Order*). Under that transmittal, the BSOCs offered two additional local access arrangements for Other Common Carriers (OCCs), to be called ENFIA B and ENFIA C. Under Transmittal 43, the BSOCs established three separate rate elements for the new service features; under Transmittal 45, the BSOCs increased rates for rate element 2 of ENFIA B and C. A number of petitions to reject or, alternatively, suspend and investigate the two transmittals were filed. The Common Carrier Bureau (Bureau) found no basis for rejection but determined that questions concerning the cost support data warranted investigation. Accordingly, this Bureau initiated an investigation and established an accounting order. The accounting order required the BSOCs to list charges made to individual customers. The Bureau further stated that it would set out these issues "with particularity" in a separate designation Order. *Id.* at para. 6. No designation Order has ever been issued.

12. In August 1982, AT&T, on behalf of the BSOCs, filed increases to the ENFIA B and C rates which had become effective pursuant to Transmittals 43 and 45. BSOC Transmittal No. 56, ENFIA (Trunk Terminations) Mimeo No. 5704, released Aug. 10, 1982. Several parties filed petitions to reject or, in the alternative, to suspend and investigate these revisions. The Bureau denied the petitions to reject but granted the petitions for investigation. In so doing, the Bureau noted that in the *January 1982 ENFIA Order*, it had permitted the introduction of the new service offerings to become effective, despite questions concerning the cost support data, because of the demand for the alternative forms of exchange access. The BSOCs had based the rates for these offerings upon the existing ENFIA A rate structure. The Bureau noted that the BSOC filing proposed to maintain the same rate relationship between these services which existed at the time the BSOC 9 tariff became effective. Therefore, the Bureau denied petitions to reject these tariff revisions. However, the Bureau included the rate revisions in the pending investigation of the ENFIA B and C rates (Transmittal Nos. 43 and 45) subject to the same accounting order in *January 1982 ENFIA Order*, para. 11.

13. During the period in which these tariff revisions were filed, this Commission was also examining the overall ENFIA agreement. In April 1982, this Commission extended the ENFIA agreement for two more years. Exchange Network Facilities for Interstate Access, CC Docket No. 78-371, 90 FCC 2d 6 (1982) (*Extension Order*). This Commission noted that a dispute among the parties concerning the proper calculation of billed minutes and Separations Amount variables necessary to compute the monthly charge per ENFIA line under the ENFIA agreement would be resolved in the context of revisions to BSOC Tariff F.C.C. No. 8. *Id.* at 18. Immediately after the *Extension Order* was released, AT&T, on behalf of the

BSOCs, filed Transmittal No. 53 which proposed rates to reflect substantial increases to both the minutes of use and Separations Amount. Numerous parties filed petitions to reject or suspend and investigate this transmittal. This Commission determined that the parties did not present grounds for rejection but did raise significant questions concerning the lawfulness of the revisions and consistency with the language and intent of the ENFIA agreement. Therefore, this Commission suspended the effectiveness of the revised tariff for five months and imposed an interim billing and collection rate. The rate was subject to adjustment at the termination of the investigation. BSOC Transmittal No. 53, CC Docket No. 78-371, ENFIA, 90 FCC 2d 202, 203, 215 (1982) (*Investigation Order*).

14. Pursuant to that *Investigation Order*, AT&T filed reports concerning minutes of use and the OCCs filed material concerning the Separations Amount. This Commission concluded that the rate in BSOC Transmittal 53 was unreasonable and ordered the BSOCs to file a replacement tariff that conformed to the findings of the investigation. In addition, in keeping with the terms of the accounting order initiated in the *Investigation Order*, the OCCs were ordered to remit to AT&T the difference between the interim rate and the rate determined as a result of the investigation. BSOC, Transmittal No. 53, CC Docket No. 78-371, ENFIA, 91 FCC 2d 1079, 1092-94 (1982) (*BSOC Transmittal 53 Order*).

15. A number of parties filed petitions for reconsideration of the *BSOC Transmittal 53 Order*. This Commission rejected those petitions which sought reversal of that part of the Order requiring the OCCs to remit excess charges to AT&T, but granted AT&T's petition to modify this Commission's computation of part of the replacement rates. BSOC Tariff F.C.C. No. 8, ENFIA, Transmittal No. 53, CC Docket No. 78-371, FCC 83-125, released Apr. 5, 1983 (*Reconsideration Order*). While these petitions for reconsideration were pending, other parties appealed various other Commission Orders relating to the ENFIA agreeement and ENFIA tariffs, including the *Extension Order*, the *Investigation Order*, and the *BSOC Transmittal 53 Order*, to the United States Court of Appeals for the District of Columbia Circuit. The Court resolved a number of issues pertinent to the ENFIA agreement and affirmed these three Orders. *MCI Telecommunications Corp. v. FCC*, 712 F. 2d 517 (D.C. Cir. 1983). However, the court remanded the *Extension Order* for the limited purpose of determining whether the OCCs were entitled to retroactive refunds and prospective relief for charges paid pursuant to the ENFIA agreement, in view of this Commission's finding in CC Docket No. 78-72, the MTS and WATS market structure proceeding, that the entire access compensation system was discriminatory.[7]

16. Three OCCs then filed complaints with this Commission against AT&T for refunds or damages. This Commission denied the complaints, stating that the OCCs were not "victimized" by the ENFIA agreement and that, in fact, the OCCs paid less under the ENFIA tariffs than they would have paid under a nondiscriminatory system such as the one prescribed in CC Docket No. 78-72. Accordingly, the complainants were not entitled to retroactive relief because they could not demonstrate that they were harmed by the discriminatory ENFIA rates. Nor could the complainants show the amount of damages with reasonable certainty since this Commission had previously rejected the notion that the measure of damages is the difference between ENFIA and local rates applicable to foreign exchange (FX) and common control switching arrangements (CCSA) services. ENFIA, Allnet Communications Service, Inc. v. AT&T, CC Docket No. 78-371, 1 FCC Rcd 618, 628-29 (1986) (*ENFIA Complaint Order*). Moreover, this Commission determined that prospective relief had already been granted to the complainants at the time this Commission's decision in CC Docket No. 78-72 was affirmed on appeal[8] because the Commission's decision eliminated prospectively the discrimination formerly existing among the various access services. *Id.* at 624.

17. As an initial matter, we find that the investigations and the accounting orders imposed for the transmittals at issue here, while never formally terminated, were effectively nullified by this Commission's decision in the *ENFIA Complaint Order*. That Order concluded that the complainants could not demonstrate that the OCCs were harmed by the discriminatory ENFIA rates and therefore the OCCs were not entitled to retroactive refunds for the charges paid pursuant to the ENFIA agreement. Our decision in the *ENFIA Complaint Order* was based on the finding that the OCCs, in fact, paid less under the ENFIA agreement than the OCCs would have to pay under a nondiscriminatory system such as that prescribed in the CC Docket 78-72 proceeding.[9] The proceeding culminating in the *ENFIA Complaint Order*, while limited to only three OCCs, was not limited to certain ENFIA rates. Rather, it examined the ENFIA tariffs as a whole including, by reference, Transmittal 53, and, by implication, Transmittals 43, 45, and 56.

18. Therefore, we conclude that this Commission's determination in the *ENFIA Complaint Order* that the OCCs were not entitled to refunds of charges paid under the ENFIA tariffs precludes any refunds resulting from past ENFIA rates, and thus moots the investigations. Accordingly, the accounting orders established in those investigations should be terminated, particularly since those tariffs were replaced by the access charge system prescribed in CC Docket 78-72. The access charge rules eliminated, prospectively, the discrimination that formerly existed among various access services by deriving a comprehensive plan for local exchange carriers to recover the costs of providing access needed to complete interstate and foreign communications.[10]

V. CONCLUSION; ORDERING CLAUSES

19. On the basis of the foregoing discussion, we consider the investigations of BSOC Transmittal Nos. 43, 45, 53, and 56 to be moot and therefore terminated by this Order. In addition, any accounting orders imposed in those investigations are likewise terminated.

20. Accordingly, IT IS ORDERED that the petition for review filed by the Southern New England Telephone Company IS GRANTED to the extent indicated herein.

21. IT IS FURTHER ORDERED that the investigation and accounting order initiated in BSOC Transmittal Nos. 43 and 45, Mimeo No. 1425, released Jan. 6, 1982, ARE TERMINATED.

22. IT IS FURTHER ORDERED that the investigation and accounting order initiated in BSOC Transmittal No. 56, Mimeo No. 5704, released Aug. 10, 1982, ARE TERMINATED.

23. IT IS FURTHER ORDERED that the investigation and accounting order initiated in BSOC, Transmittal No. 53, 90 FCC 2d 202 (1982) ARE TERMINATED.

24. IT IS FURTHER ORDERED that the motion to consider accounting orders in the proceedings in which they have been entered filed by MCI Telecommunications Corporation IS GRANTED to the extent indicated herein and otherwise IS DENIED.

25. IT IS FURTHER ORDERED that the investigation initiated in CC Docket No. 21499 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

LIST OF OPEN ACCOUNTING ORDERS

ENFIA

AT&T Transmittal Nos. 43 and 45, Mimeo No. 1425, released Jan. 6, 1982.

AT&T Transmittal No. 56, Mimeo No. 5704, released Aug. 10, 1982.

AT&T Transmittal No. 53, 90 FCC 2d 202 (1982).

GENERAL RATE INCREASES

AT&T, Docket No. 20732, 58 FCC 2d 1 (1976).

AT&T, Charges for Interstate Service, Mimeo No. 32427, released June 13, 1980.

AT&T, Transmittal Nos. 13703-13708, et al., 86 FCC 2d 956 (1981).

PRIVATE LINE PROCEEDINGS

AT&T, CC Docket No. 18128 (TELPAK), 13 FCC 2d 853 (1968).

AT&T, CC Docket No. 18128 (TELPAK), 20 FCC 2d 383 (1969).

AT&T, CC Docket No. 18128 (TELPAK), 33 FCC 2d 522 (1972).

AT&T, CC Docket No. 20736, 58 FCC 2d 899 (1976).

AT&T, CC Docket No. 20814, 59 FCC 2d 428 (1976).

AT&T, CC Docket No. 79-138, 72 FCC 2d 313 (1979).

WATS AND 800 RATE INVESTIGATIONS

AT&T, CC Docket No. 19129, 40 FCC 2d 18 (1973).

AT&T, CC Docket No. 19989, 46 FCC 2d 81 (1974).

AT&T, CC Docket No. 80-765, 86 FCC 2d 820 (1981).

FOOTNOTES

[1] Commission Establishes Pleading Cycle for Petitions Concerning Southern New England Telephone Company's Petition for Review of Outstanding Accounting Orders, 2 FCC Rcd 5262 (1987).

[2] The parties filing comments are: Ameritech Operating Companies (Ameritech), American Telephone and Telegraph Company (AT&T), BellSouth Telephone Companies, Cincinnati Bell Telephone, Contel Corporation (Contel), GTE Telephone Companies (GTOC), MCI, Southwestern Bell Telephone Company (SWB), and United States Telephone Association (USTA). Reply comments were filed by: BellSouth, MCI, SWB, USTA, Pacific Bell and Nevada Bell, Bell Atlantic Telephone Companies, and SNET.

[3] This Order also terminates Docket No. 21499, an access related investigation in which an accounting order was not imposed. American Telephone and Telegraph Company, Docket No. 21499, Memorandum Opinion and Order, 66 FCC 2d 1018 (1977). This investigation involved a number of issues related to the offering of facilities to the Other Common Carriers (OCCs) by AT&T and the then associated Bell System Operating Companies (BSOCs).

[4] For a detailed description of the ENFIA accounting orders and the related investigations, see paras. 10-15, *infra*.

[5] AT&T's comments regarding each of other service categories will be discussed in the subsequent Order which addresses the particular category.

[6] The statute of limitations contained in Section 415(c) of the Communications Act does not apply to Section 204 tariff investigations.

[7] MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, 93 FCC 2d 243 (1983).

[8] *National Ass'n of Regulatory Util. Comm'ners v. FCC*, 737 F.2d 1095, 1132-38 (D.C Cir. 1984), *cert. denied*, 105 S. Ct. 1224 (1984).

[9] MTS and WATS Market Structure, CC Docket No. 78-72, Third Report and Order, FCC 82-579, released Feb. 28, 1983, 48 Fed. Reg. 10,319 (1983); *modified on reconsideration*, 97 FCC 2d 682 (1984); *modified on further reconsideration*, 97 FCC 2d 834 (1984); *aff'd in principal part and remanded in part, National Ass'n of Regulatory Util. Comm'ners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984); *cert. denied*, 105 S.Ct. 1224 (1985); *modified on further reconsideration*, 49 Fed. Reg. 46,383 (1985), 50 Fed. Reg. 18,249 (1985); *aff'd on further reconsideration*, 50 Fed. Reg. 43,707 (1985); *dismissed, US Telephone, Inc. v. FCC*, 725 F. 2d 126 (D.C. Cir. 1984).

[10] For similar reasons, we also terminate Docket No. 21499. In that proceeding, this Commission investigated and then ordered AT&T to offer group and supergroup facilities to OCCs. However, we deferred review of interim tariff rates charged by the BSOCs to OCCs, which were the result of the Settlement Agreement in Docket No. 20099. In 1984, as part of its investigation of special access tariff provisions, this Commission found that the record "amply supported" a finding that the rates in the Settlement Agreement were unjust, unreasonable, and unduly preferential in violation of the Communications Act. We concluded that adherence to the rates established in Docket No. 20099 would "adversely affect the public interest" as the rates were too low and placed an excessive burden on other consumers from whom the exchange carriers' shortfall would ultimately be recovered. Investigation of Access and Divestiture Related Tariffs, Memorandum Opinion and Order, CC Docket No. 83-1145, FCC 84-524, Mimeo 35290, at para. 85, released Nov. 9, 1984, *remanded on other grounds, Western Union Telegraph Company v. FCC*, 815 F.2d 1495 (D.C. Cir. 1987). This

Commission's determination that the interim Settlement Agreement rates, which are the subject of Docket No. 21499, were unlawfully low eliminates any potential eligibility of the OCCs to refunds for payments made pursuant to those tariffs. Moreover, no prospective relief is necessary or appropriate since these interim rates are no longer in effect. Accordingly, we terminate Docket No. 21499 and its deferred investigations.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

KANSAS STATE TELEPHONE COMPANY

Petition for Waiver of Sections 36.154(e)(1) and (2), Sections 36.125(c) and (f), and the Definition of "Study Area" in Part 36, Subpart H, of the Commission's Rules

UNITED TELEPHONE COMPANY OF MISSOURI

Petition for Waiver of Sections 36.154(e)(1) and (2) and Section 36.125(c) and the Definition of "Study Area" in Part 36, Subpart H, of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 1989; Released: July 13, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The United Telephone Company of Missouri (United) and the Kansas State Telephone Company (Kansas State) have filed petitions seeking waivers of Part 36 of the Commission's Rules to enable them to effectuate an agreement by which United will exchange the property and assets in five of its Missouri exchanges for all the property and assets of Kansas State in Kansas. United's petition, filed on April 21, 1989, seeks waiver of Sections 36.154(e)(1) and (2),[1] Section 36.125(c),[2] and the definition of "study area" contained in Part 36, Subpart H, of the Commission's Rules[3] to permit it to adjust certain jurisdictional allocation factors for local loop plant and local switching equipment, to recast certain historical data to reflect the characteristics of the Missouri study area after the exchange of property, and to reconfigure study area boundaries in Missouri. On April 28, 1989, Kansas State filed a related petition seeking waiver of the same rules as well as a waiver of Section 36.125(f)[4] to permit it to calculate the allocation factor for its local switching equipment without applying the weighting factor required by that rule. To the extent discussed below, we grant both the United and Kansas State petitions.

II. BACKGROUND

2. On November 1, 1988, United, a wholly-owned subsidiary of United Telecommunications, Inc., and Kansas State, a wholly-owned subsidiary of Contel Corporation (Contel), entered into an agreement pursuant to which United will exchange its telephone property and certain related assets in five of its Missouri exchanges for all the telephone property and certain related assets of Kansas State located in Kansas. In Kansas, United will assume control of all operations of a complete study area that presently belongs to Kansas State. Because the Kansas segment of the trade includes an entire study area, no Part 36 waivers are required. In Missouri, United proposes to split its study area into two study areas. United will maintain control of one of these areas and Kansas State will assume control of the other. The carriers plan to complete this exchange of property by June 30, 1989.

3. The definition of study area contained in Part 36, Subpart H of the Commission's rules states that the boundaries of a study area shall be frozen as they were on November 15, 1984. Thus, to effectuate the agreement both United and Kansas State require a waiver of that definition of a study area. Both United and Kansas State seek a waiver of the Commission's Rules to allow them to modify certain historical jurisdictional separations factors to reflect the new study area configuration.

4. Section 36.154 of the Rules prescribes the procedures to be followed in apportioning Exchange Line Cable and Wire Facilities (C&WF) - Category 1 between jurisdictions. Sections 36.154(e)(1) and (2) define the procedures for the development of the interstate allocation factor known as the subscriber plant factor (SPF), which is used to determine the interstate portion of Exchange Line C&WF, Subcategory 1.3. The SPF is developed by use of calendar year 1981 interstate usage data associated with common line plant. These sections of the Commission's Rules reflect the Commission's decision that a 25 percent allocation factor for interstate usage for all study areas would produce reasonable and fair results in conjunction with the Commission's access charge plan and allow the targeting of rate support to high cost areas. Under these rules the interstate SPFs were frozen at the 1981 levels until 1986, when the gradual transition to a 25% factor began. The transition is now approximately one-half complete.

5. Section 36.125 sets forth the procedures to apportion Central Office Equipment (COE) Local Switching Equipment - Category 3. Beginning January 1, 1993, COE Category 3 investment will be apportioned on the basis of relative dial equipment minutes of use (DEM). However, to help carriers avoid a single large shift in revenue requirements in any one year, the rules provide for a transition period from 1988 to 1992. Section 36.125(c) defines the procedures to be followed in developing the interstate allocator during the transition period. This interstate allocator is based, in part, on a composite allocator, calculated to reflect the year-end 1987 interstate allocation of COE Categories 4,5,6, and 7 of the former Part 67.[5]

6. Section 36.125(f) defines the procedures for allocating COE Local Switching Equipment - Category 3 investment for small carriers. These procedures provide small carriers with interstate assistance by allowing the use of weighting factors for their interstate minutes. Absent the proposed waiver of this rule, Kansas State's newly created Missouri study area would use a 3.0 weighting factor.

III. SUMMARY OF WAIVER PETITIONS

7. United argues that, as a result of its property trade with Kansas State, it will need to redefine the boundary of its Missouri study area and to adjust the investment in this newly configured study area. It also contends that the jurisdictional allocation of this resized investment will be skewed unless it is allowed to recast certain historical data used in apportioning costs between the state and interstate jurisdictions. United explains that as a result of the exchange of property, its total subscriber loops in the revised Missouri study area will be reduced by 6,403 lines, with a corresponding reduction in its total Exchange Line C&WF, Subcategory 1.3 investment. United argues that it must revise the 1981 base-year SPF to reflect the proposed study area boundaries so that the jurisdictional allocation of the local loop investment reflects the usage of the post-trade environment. It also argues that it must make similar adjustments to the historical allocation factors for switching equipment, so that the allocation of the resized COE Category 3 investment will accurately reflect the post-trade study area conditions.

8. In its petition, Kansas State argues that the development of the SPF used to determine the interstate portion of Exchange Line C&WF - Subcategory 1.3, requires the use of calendar year 1981 interstate usage data associated with common line plant. It requests the Commission to allow it to compute a new frozen 1981 interstate SPF for the new study area in Missouri as if that area had been in existence in 1981. It proposes to use this recomputed SPF as the starting point in its transition to the 25 percent general allocator.

9. Kansas State also requests permission to recompute the composite allocator used in the allocation of COE Local Switching Equipment - Category 3, to reflect its new study area. In addition, Kansas State requests a waiver of the weighting factor requirement in Section 36.125(f). Although the new Kansas State study area will have less than 10,000 access lines and be eligible for a weighting factor of 3.0, Kansas State asserts that it plans to merge this area with the existing Contel of Missouri study area which is over 50,000 access lines and, thus, not eligible for special weighting.

10. Both United and Kansas State request a waiver of the study area definition contained in Part 36, Subpart H, Glossary, which states that study area boundaries shall be frozen as they were on November 15, 1984. Both state that the intent of the requirement that boundaries be frozen as of November 15, 1984 was recommended by the Federal-State Joint Board[6] to prohibit companies from segregating high cost exchanges within their existing service territory as separate study areas in order to receive more high cost support. Kansas State states that because the new study area is the result of a property exchange between unaffiliated companies, this exchange of service areas does not pose such a threat. Additionally, United argues that this property exchange does not contravene the Joint Board's decision to define "study area" in a manner that does not discourage a carrier from acquiring a high cost exchange.

IV. DISCUSSION

11. We have considered the petitioners' arguments and conclude that both carriers should be allowed to reconfigure their study area boundaries in Missouri, to adjust the jurisdictional allocation factors for local loop plant and local switching equipment, and to recast certain historical data necessary to reflect the new study area boundaries. Accordingly, we waive, for both petitioners, Sections 36.154(e)(1) and (2), Section 36.125(c) and the definition of "study area" contained in Part 36, Subpart H of the Commission's Rules. In addition, we grant Kansas State's request for a waiver of Section 36.125(f).

A. *Allocation of Plant*

12. As a result of the exchange of service areas proposed by the carriers, United will have 6,403 fewer access lines in Missouri, with a corresponding reduction in its total Exchange Line C&WF - Subcategory 1.3 investment. If the ongoing jurisdictional allocation of the C&WF investment is to reflect the current structure, United must recompute its 1981 base-year SPF by eliminating the figures associated with the subscriber lines it will no longer serve. Similarly, Kansas State must calculate a 1981 base-year SPF for its new Missouri study area. Based upon our review of carrier comments and data, we believe that, in the aggregate, these revisions will have a minimal effect on the assignment of costs between the state and interstate jurisdictions.

13. We also agree with the carriers that the COE Category 3 composite factors should be recomputed to reflect the new study area boundaries in Missouri. As a result, we waive Section 36.125 (c) in order to allow the carriers to recompute these factors.

14. In addition, we believe that Kansas State should not be required to apply the Category 3 weighting factor prescribed in Section 36.125(f) of the Rules. The intent of this rule was to provide assistance to small carriers by providing special weighting of the interstate minutes. However, Kansas State asserts that this new study area is temporary since it plans to merge it into an existing Contel of Missouri study area, which has well over 50,000 access lines and therefore receives no special interstate weighting.[7] In view of this representation, we will not require Kansas State to apply the weighting factor specified in the Rules.

B. *Waiver of Definition of Study Area*

15. The petitioners request a waiver of the definition of a study area as defined in Part 36, Subpart H of the Commission's rules. The petitioners argue that this waiver is necessary because the exchange of service areas proposed by the carriers will split United's existing Missouri study area into two new study areas.

16. The Commission adopted the requirement that study area boundaries be frozen to prohibit companies "from setting up high cost exchanges within their existing service territory as separate companies to maximize high cost support."[8] We have thoroughly analyzed the carriers' proposals and have determined that their adoption will not substantially affect the aggregate high cost support for these carriers. As a result, we believe that the proposed waiver of the study area definition will not violate the Commission's intent and should be granted.

C. *Summary*

17. We grant the Part 36 waivers requested by United and Kansas State because we conclude that they are necessary to provide for a more equitable assignment of costs between the state and interstate jurisdictions.

V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED That United Telephone Company of Missouri's petition for waiver of Section 36.154(e)(1) and (2), Section 36.125(c) and the definition of "study area" contained in Part 36, Subpart H of the Commission's Rules and Regulations IS GRANTED.

19. IT IS ALSO ORDERED That Kansas State Telephone Company's petition for waiver of Section 36.154(e)(1) and (2), Section 36.125(c) and (f), and the definition of "study area" contained in Part 36, Subpart H of the Commission's Rules and Regulations IS GRANTED.

20. IT IS FURTHER ORDERED, That this *Memorandum Opinion and Order* IS EFFECTIVE UPON ADOPTION.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. §§36.154(e)(1) and (2).

[2] 47 C.F.R. §36.125(c).

[3] 47 C.F.R. §36 Subpart H, Glossary.

[4] 47 C.F.R. §36.125(f).

[5] Part 67 was replaced by Part 36 effective January 1, 1988.

[6] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (December 12, 1984)(*Joint Board Order*).

[7] Kansas State Petition at 6.

[8] *Joint Board Order, supra,* at para. 65

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 13, 1989

APPLICATIONS FILED PURSUANT
TO SECTION 62.11 OF THE
COMMISSION'S RULES

EID 665	ROBERT E. CONN
EID 666	FRANZ-ANTON GLASER

Applicants seek authorization to serve as a director of Houston International Teleport while also serving either as an officer and/or director of World Communications, Inc.

Comments on the above application should be addressed to the Enforcement Division, Common Carrier Bureau within 10 days of the release of this public notice. The application may be inspected in Room 6206, 2025 M Street, N.W., Washington, D.C. 20554. Questions should be directed to Jeff Hertz, (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 13, 1989

AMERICAN TELEPHONE AND TELEGRAPH COMPANY FILES REVISIONS TO ITS COST ALLOCATION MANUAL

On June 30, 1989, the American Telephone and Telegraph Company (AT&T) filed proposed revisions to its cost pool and time reporting allocation methodologies in its permanent cost allocation manual for the separation of regulated and unregulated costs. AT&T filed its original manual in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987).

Parties may file comments on the proposed revisions to the cost manual no later than **July 25, 1989.** Replies should be filed by **August 4, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies may also be obtained from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 13, 1989

LOCAL EXCHANGE CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

On June 30, 1989, the following local exchange carriers (LECs) filed proposed revisions to the cost categories of their permanent cost allocation manuals for the separation of regulated and unregulated costs: The Ameritech Operating Companies, The Bell Atlantic Telephone Companies, Central Telephone Company, Bell South Corporation, Lincoln Telephone and Telegraph Company, Nevada Bell, Pacific Bell, NYNEX Telephone Companies, U S West and United Telephone System. The LECs filed their original manuals in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987).

Parties may file comments on the proposed revisions to the cost manuals no later than **August 9, 1989.** Replies should be filed by **August 29, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 13, 1989

US WEST'S NOTIFICATION OF ENHANCED SERVICE MARKET TRIAL (CC DOCKET NO. 88-616)

On June 21, 1989, US West, Inc. (US West) filed in this docket notification of a market trial of a videotex information access service called CommunityLink. US West states that the market trial is an interim step in its plan to offer a basic gateway service. (*See*, NYNEX Petition for Declaratory Ruling, CC Docket 88-2, filed Jan. 17, 1989). According to US West, CommunityLink will provide limited access services between videotex service providers and end users. US West states that there are four functions of CommunityLink: (1) access and routing; (2) a directory of services; (3) user preference files; and (4) usage recording. US West plans to start the market trial on October 1, 1989.

In its notification, US West describes its plans for complying with the general conditions for conducting enhanced service market trials established in a recent Common Carrier Bureau order that permits BOCs to conduct limited market trials of enhanced services without filing comparably efficient interconnection (CEI) plans. (*See* BOC Notices of Compliance with CEI Waiver Requirements for Market Trials of Enhanced Services, 4 FCC Rcd 1266 (1989) (Market Trial Order)).

US West also seeks special permission to exceed the eight month period allowed for market trials, if the Commission finds gateway services to be basic services, or to file a CEI plan if the Commission finds the service to be enhanced. The Commission seeks comments on US West's request for special permission to exceed the eight month period allowed for market trials.

Interested parties should file comments on US West's request by **July 31, 1989,** and reply comments by **August 7, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. US West's notification is available for inspection and copying, during normal business hours, in the FCC's Dockets Branch (Room 239), 1919 M Street, N.W., Washington, D.C. 20554. Copies of US West's notification also can be obtained from ITS.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US WEST, INC.

Plan for Comparably Efficient
Interconnection to Enhanced
Services Providers for
Protocol Processing Services

MEMORANDUM OPINION AND ORDER

Adopted: July 1, 1989; Released: July 13, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On February 24, 1989, pursuant to the requirements the Commission adopted in the *Computer III* proceeding.[1] US West, Inc. (US West) filed a Comparably Efficient Interconnection (CEI) plan (the Plan) for Protocol Processing Services, which, according to US West, will facilitate network communications among diverse computer systems.[2] ADAPSO and Telenet Communications Corporation (Telenet) filed comments on the Plan, and US West filed a reply. *Computer III* requires a Bell Operating Company (BOC) that wishes to offer an enhanced service, or class of enhanced services, on an unseparated basis prior to implementation of a comprehensive Open Network Architecture Plan (ONA) to submit and obtain approval of a CEI plan for the specific services it proposes to offer. In this Order, we approve the Plan, subject to certain conditions.

II. THE PLAN

A. *Service Description*

2. US West proposes to provide a variety of protocol processing services[3] for use with its Public Packet Switching Network (DIGIPAC) and private line services. According to US West, the protocol processing services will allow customers to use "US West's network access services to transport data originated from customer premises equipment (CPE) even though the CPE may employ different communications protocols."[4] US West also proposes to add additional protocols to its offering as new technologies or equipment become available.

3. US West states that the actual protocol conversion will take place in an access concentrator, a packet switch, or a dedicated network multiplexer located in US West's central office. US West will provide the basic services, *i.e.*, dial access and dedicated access services, to access its DIGIPAC and private line services.

4. The Plan does not apply to asynchronous/X.25 and asynchronous/X.75 conversions to the extent that US West is already permitted to collocate the equipment for those services in its central office.

(1) *Positions of the Parties*

5. Telenet agrees that US West should be permitted to provide additional protocol conversions, including protocol conversions other than those listed in the CEI plan, provided that US West ensures that such services do "not involve basic services not previously identified in prior CEI Plans, or utilize basic services previously identified in a different manner, or at different rates."[5] Any "open-ended" authority granted by the Commission, says Telenet, must be so conditioned. In its reply, US West provides this assurance.[6]

(2) *Discussion*

6. We see no need, for CEI purposes, to require US West to file a new plan for every additional protocol service it intends to offer given its commitment that such additional protocol services "will use only the underlying basic services specified in its filed CEI Plan and that those basic services will be used in the same manner and taken at the same rate as those specified in the plan."[7] As we have stated in other orders, there is no reason to require separate CEI plans for enhanced services that are provided as a "package" if a carrier demonstrates that those services comply with the Commission's CEI requirements.[8] We find that US West satisfies this standard for future protocols used in connection with this offering.

B. *Minimization of Transport Costs*

7. The Plan states that US West's enhanced protocol processing services operation will charge itself an access link rate that is the same as that paid by non-collocated enhanced service providers.[9] US West states that its enhanced protocol processing services will obtain basic services from existing tariffs or price lists at the same rates as are available to unaffiliated ESPs.[10] According to US West, the technical characteristics of the interfaces that are available to US West and its enhanced services competitors pursuant to such tariffs or price lists will be identical. US West includes in its Plan, as Exhibit D, a sample portion of a tariff/price list for the State of Nebraska.

(1) *Positions of the Parties*

8. Although Telenet does not oppose the US West plan, it states that the plan is unclear because US West's tariff/price list (Exhibit D) reflects prices that are inconsistent depending on whether an ESP is collocated or non-collocated.[11] Telenet argues that this arrangement is inconsistent with the Commission's price parity policy and "two-mile rule" adopted in the *BOC ONA Order*.[12] Telenet believes that US West's pricing arrangement permits US West to reserve a "short wire" price for itself. In its comments, Telenet requests that US West address this issue in its reply comments. In the event US West intends to reserve a "short wire" price for itself, Telenet requests that the Commission direct US West to modify its tariff/price lists to be consistent with the price parity policy, or to stipulate that US West's ESP affiliate may not employ this particular type of service.[13]

9. In its reply, US West agrees with Telenet that its tariff submitted as Exhibit D differentiates between collocated and noncollocated facilities. US West states that, in light of the Commission's recent two-mile rule policies described in the *BOC ONA Order*, US West will "attribute tariffed rates to its own enhanced services operations based on an imputed two-mile distance."[14] US West believes that it is not necessary to modify its tariff/price list at this time because its May 19, 1989 Amendment to its ONA Plans will reflect its compliance with the two-mile rule. US West states that the Commission can decide, after review of its ONA Amendment, if any disparities continue to exist.

(2) *Discussion*

10. The *Phase II Reconsideration* clarified that a BOC may satisfy this CEI requirement if it charges itself an access link rate that is the same as that paid by noncollocated enhanced service providers (ESPs), provided that the access connections in each case are equivalent in technical quality.[15] The *BOC ONA Order* states that the minimization of transmission costs parameter could be satisfied through the use of price parity, and describes ways that a BOC can implement price parity for collocated enhanced services. US West's proposal, as clarified in its reply, is consistent with the principles of the *BOC ONA Order*. At this time, we do not require US West to modify its tariff/price lists consistent with the price parity policy. We conditionally approve this aspect of the plan, pending Commission review of US West's amendment to its ONA Plan. US West must, of course, conform its tariff filings described in the Plan with whatever action the Commission takes on its amendments.

C. *CEI Requirements*

11. The Plan describes US West's approach for complying with four CEI requirements for protocol processing services: (1) minimization of transmission costs; (2) unbundled access by end users to underlying carrier BOC or ESP transmission networks through a non-discriminatory user/network interface; (3) interoffice channels at tariffed rates to both BOCs and ESPs; and (4) CEI pricing requirements imposed in the *Phase I Orders*.[16] US West states that a CEI plan for protocol processing services must only comply with these four CEI requirements, although US West does describe in its Plan its approach for complying with all nine CEI Parameters of the *Phase I Order*.

(1) *Positions of the Parties*

12. ADAPSO's comments do not oppose US West's CEI Plan. However, ADAPSO argues that, the Plan "erroneously" asserts that US West must only satisfy four CEI requirements,[17] but the Plan actually addresses all nine of the CEI parameters. ADAPSO is concerned that, if US West believes it need only comply with four CEI requirements, US West may "not treat [its] competitors fairly" in terms of the other CEI parameters.[18] ADAPSO urges us to evaluate US West's Plan as it has evaluated the other CEI plans for protocol conversion services--in terms of all nine CEI parameters.[19]

13. US West attacks ADAPSO's argument that its Plan is contrary to the other plans for protocol processing services that the Commission has approved.[20] US West states that, although the Commission "has outlined nine CEI parameters that must be satisfactorily addressed" in a CEI plan, the Commission has modified "the CEI/ONA requirements for protocol processing, since a literal application of these requirements would be inefficient for the carriers and would not provide meaningful equal access for competitors."[21] US West contends that it has demonstrated its compliance with the "principles" of CEI/ONA by describing its compliance with the four CEI requirements.[22] US West contends that it will treat its competitors fairly in terms of the other CEI parameters, because it has addressed all of the CEI parameters "within the confines of its CEI Plan."[23] Therefore, US West believes that it has correctly interpreted the Commission's Orders.

(2) *Discussion*

14. The *Phase I Order* lists nine CEI parameters that are designed to ensure that the basic services used by a BOC's enhanced services are available to other ESPs in an equally efficient manner. The Commission took care to develop the parameters so that the carriers subject to them could satisfy them in a flexible manner, consonant with the particular service at issue.[24] The *Phase II Order* modified the CEI/ONA requirements for protocol processing services, since the Commission found that a "literal application of these requirements would be inefficient for the carriers and would not provide meaningful equal access for competitors."[25] Accordingly, it established four CEI/ONA conditions on BOC provision of protocol processing.[26] These generalized requirements are based on the principles of the *Asynchronous X. 25 Waiver Order*.[27]

15. In the past, we have evaluated BOCs' CEI plans for protocol processing services on the basis of their purported compliance with the nine CEI parameters of the *Phase I Order* because the plans specifically demonstrated their compliance with those parameters. However, as noted above, the *Phase II Order* lists only four CEI/ONA requirements needed for protocol processing services. We conclude that US West's interpretation of the Commission's Orders is correct with respect to these parameters, and we approve this portion of the Plan because US West has satisfied the four CEI/ONA requirements. However, because US West also demonstrates that the Plan complies with all nine CEI parameters, its Plan would be approved on the basis of its treatment of those parameters as well.

16. In addition to the CEI/ONA parameters, we evaluate US West's compliance with the other nonstructural safeguards of Computer III. We approve the Plan's treatment of CPNI subject to the following condition. The *BOC ONA Order* discusses in detail a number of CPNI issues, and requires all the BOCs to amend their ONA plans to conform to these requirements. When US West's ONA amendments for CPNI become effective, US West must implement those amendments for its protocol conversion services as well as its other enhanced services. In the interim period until such amendments for CPNI are approved and implemented, US West may follow the CPNI procedures proposed in its CEI plan. During the interim period before ONA plan amendments become effective, we prohibit US West from using CPNI to identify particular customers of existing protocol conversion competitors for "targeted" marketing efforts.[28]

17. The *BOC ONA Order* also addresses nondiscrimination reporting issues and requires several revisions to the reporting formats that US West and the other BOCs propose. As a condition of Plan approval,

once US West's amendments become effective, US West should incorporate these amendments into this CEI plan. As an interim measure, US West may submit reports in the format proposed in the Plan. Finally, we note that US West's Plan does not propose any changes to existing network interfaces. We approve this part of the Plan subject to the condition that US West comply with the Computer III network disclosure requirements if any new network interfaces are necessary in the future.

III. ORDERING CLAUSES

18. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, 218, and 405, and 5 U.S.C. §553, US West's CEI Plan for Protocol Processing Services IS APPROVED, subject to the conditions described herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration pending, appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and *sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration*), *further reconsideration pending, (pet. for rev. filed Apr. 20, 1988), California v. FCC*, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988) and *Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988).

[2] Plan at 3.

[3] US West currently expects to offer the following protocols: Asynchronous; CCITT (International Telegraphic and Telephone Consultative Committee) X.25; CCITT X.75; BSC (Binary Synchronous Protocol); 3270 DSP (Display System Protocol) BSC; BSI (Binary Synchronous Interface) BSC--contention mode; MLI (Multi-leaving Interface) BSC--multi-leaving mode; IBM SNA/SDLC (Systems Network Architecture/Synchronous Data Link Control); 3270 SNA; 2780/3780 HASP/RJE (Houston Automatic Spooling Protocol/Remote Job Entry); QLLC X.25/SDLC; 2946 Synchronous; NCR Tower 1632; NCR MODUS; NCR 9300; Burroughs BDLC (Burroughs Data Link Control); Burroughs B-20; Olivetti SP 624/644; Sperry UDLC (Universal Data Link Control); Ethernet (IEEE 802.3); and TOKEN Ring (IEEE 802.5). Plan at 3 and 4.

[4] Plan at 3.

[5] Telenet Comments at 1, n.1.

[6] US West Reply at 5.

[7] *Id.* at 5, 6.

[8] *See* In the Matter of the Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Gateway Services, 3 FCC Rcd 6045, 6047 (1988) at para. 16.

[9] Plan at 7.

[10] *Id.*

[11] Telenet Comments at 3.

[12] Filing and Review of Open Network Architecture Plans, CC Docket 88-2, Phase I, *Memorandum Opinion and Order*, 4 FCC Rcd 1 (1989), *appeal pending sub nom. Pacific Bell and Nevada Bell v. FCC*, No. 89-1194 (D.C. Cir. filed Mar. 20, 1989).

[13] Telenet Comments at at 3, 4.

[14] US West Reply at 7.

[15] *Phase II Reconsideration*, 3 FCC Rcd 1155 (1988) at para. 34.

[16] Plan at 6.

[17] ADAPSO Comments at 4.

[18] *Id.* at 2.

[19] *Id.* at 4.

[20] US West Reply at 2, 3.

[21] *Id.* at 3.

[22] *Id.* at 4.

[23] *Id.*

[24] *See Phase I Order*, 104 FCC 2nd 1039-42, para. 154-165.

[25] *See Phase II Order*, 2 FCC Rcd 3078, para 44.

[26] *Id.* at para 62.

[27] Petition for Waiver of Section 64.702 of the Commission's Rules, *Memorandum Opinion and Order*, 100 FCC 2d 1057 (1985).

[28] We conditioned our approval of US West's CEI Plan for VMS on a similar commitment by US West. *See* US West's Plan for Comparably Efficient Interconnection to Providers of Voice Messaging Services, 4 FCC Rcd at 552 (1989), at para. 55; BellSouth's Plan for Comparably Efficient Interconnection of Enhanced Services Providers for Synchronous Protocol Services, 4 FCC Rcd 1560 (1989) at para. 8; and Southwestern Bell's Plan for Comparably Efficient Interconnection of Enhanced Services Providers for Protocol Conversion Services, 4 FCC Rcd 2236 (1989) at para. 8.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Notification of Intent to Construct and Petition for Limited Reconsideration in the Application to Modify License WNKM 964 and Request for Waiver by Sharon Mutter — File No. LW-2714M

ORDER

Adopted: July 3, 1989; Released: July 13, 1989

By the Chief, Land Mobile and Microwave Division, Private Radio Bureau:

I. INTRODUCTION

1. On March 23, 1989, we adopted an *Order*[1] denying Sharon Mutter's (the licensee) request that we waive the requirement that a Specialized Mobile Radio (SMR) system licensed in the 896-901 MHz and 935-940 MHz bands (900 MHz) must have its primary base transmitters constructed at a site within the Designated Filing Area (DFA) for which the license was issued. The licensee had requested permission to modify her 900 MHz SMR license to relocate her primary base transmitters to Winterthur, Delaware, to serve the Wilmington, Delaware, Metropolitan Statistical Area. Winterthur is located outside the Philadelphia DFA, the DFA for which the licensee's license is granted. Although we denied the licensee's request for the waiver, we granted in part her application to modify her license by designating the Winterthur site a secondary site.[2] For administrative reasons, we directed her to notify the Bureau's Licensing Division in Gettysburg, Pennsylvania, of her intent to construct a secondary site at Winterthur.

2. On May 3, 1989, Motorola, Inc. (the system manager), on the licensee's behalf, filed a Notification of Intent to Construct seven channels at the site at Winterthur. Based on this notification, license WNKM 964 is modified to reflect a secondary site located at Winterthur, Delaware.

3. In addition, the system manager, on behalf of the licensee, petitioned for limited reconsideration of our *Order*.[3] The licensee's system manager requested that the Bureau waive its policy that all channels must be constructed at a single location considered the primary site. For the reasons discussed below, we deny the petition for limited reconsideration.

II. REQUEST

4. The licensee's system manager accepts our decision that a base station located at Winterthur would be a secondary site. The system manager asserts, however, that the use of the ten channels in both Winterthur and Philadelphia would result in a substantial coverage overlap between the two systems and that the resulting interference would preclude any frequency reuse at the secondary site at Winterthur.[4] In order to avoid the interference problems, the licensee's system manager requests that we allow the licensee to construct three of the system's ten channels at the Philadelphia site and seven of the system's ten channels at the Winterthur site.[5] In addition, the licensee's system manager requests that all ten channels be afforded interference protection as if they were all constructed at the Philadelphia site.

III. DISCUSSION

5. As indicated in our *Order*, the 900 MHz SMR licensing procedures were established to expedite service to the most densely populated areas surrounding the top 50 urban centers because these areas were in most need of additional communication capacity.[6] We realized that some metropolitan areas outside these defined areas could be foreclosed from receiving adequate 900 MHz SMR service from a base station constructed within a DFA during the first licensing phase (Phase I). The licensee, however, was well aware at the time she applied for 900 MHz SMR channels within a DFA that she would be required to build a system within that DFA or forfeit her license. We do not find unreasonable our insistence that the licensee construct all ten channels within the DFA and that such channels, once constructed, remain in permanent operation within the DFA. Nor are we convinced that the Commission's licensing procedures for the 900 MHz SMR channels,[7] based on the showing made in the proceeding, should be modified to permit the location of channels in Winterthur during Phase I.

6. As previously stated, the 900 MHz SMR licensing procedures were designed to provide maximum service to the population within the DFAs. The procedures also anticipated that areas outside the DFAs would receive service from SMR systems licensed during the second licensing phase (Phase II). Allowing the licensee to deconstruct her channels at her Philadelphia site and construct such channels only at her Winterthur site could give her an economic and competitive advantage over potential Phase II licensees that might wish to provide service to the Wilmington area. We decline to prejudice the rights of such future Phase II licensees when the licensee has clear alternatives within the existing rules. For example, the system manager fails to explain why the technical parameters submitted in her applications are the only ones available to her in engineering in a secondary site at Winterthur. In order to avoid the interference overlap, other measures, such as reducing the power of one system or using a directional antenna, should be available.

7. In addition, we do not find a critical need for additional communication capacity in the areas the licensee proposes to serve from her Winterthur site because there are several 800 MHz SMR systems with additional loading capacity available in those areas. Thus, allowing the licensee to remove the seven channels from her Philadelphia transmitter site undermines our determination that the public interest is best served by all 900 MHz SMR channels being available for use within the Philadelphia DFA. Accordingly, we find that because neither the licensee nor her system manager has demonstrated unique circumstances or lack of reasonable alternative solutions

under our rules,[8] the licensee must construct all ten channels granted under her license at her Philadelphia site.[9]

IV. CONCLUSION

8. IT IS THEREFORE ORDERED that the petition for limited reconsideration is DENIED. IT IS FURTHER ORDERED that license WNKM 964 is modified to reflect that base transmitters for seven of the ten licensed channels are located at a secondary site at Winterthur, Delaware.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division

FOOTNOTES

[1] Order, In the Matter of Application to Modify License WNKM 964 and Request for Waiver by Sharon Mutter, 4 FCC Rcd 2654 (1989).

[2] A secondary site receives no interference protection from co-channel licensees and must not create interference with co-channel licensees' systems. 47 C.F.R. § 90.631.

[3] Although the system manager entitled the pleading a petition for limited reconsideration, it does not appear that a change of our action has been requested. On the other hand, the waiver requested is so intrinsically linked to our prior decision that it should be considered as part of the original proceeding. Consequently, we will consider the pleading as a request for waiver but use the information previously filed in our consideration. We will, however, refer to the document as it is entitled.

[4] We note that the coverage contours submitted with the petition for limited reconsideration are substantially different from the coverage contours submitted with the original waiver request. There is no explanation of why the coverage contours of the two systems have changed.

[5] The system manager relies on the Commission's Memorandum Opinion and Order, In re Request of American Mobile Data Communications, Inc. (AMDC) for Waiver and Other Relief to Enable the Construction of a Nationwide Two-way Mobile Data Communications Network, 4 FCC Rcd 3802 (1989), in which the Commission accepted AMDC's plan to establish multiple transmitter sites within a DFA. Under AMDC's proposal, for the most part, no one site would have all ten channels constructed at it. The multiple transmitter sites, however, would all be constructed within the DFA to which the channels are assigned.

[6] 4 FCC Rcd at 2654.

[7] Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, 1 FCC Rcd 543 (1986).

[8] The licensee's system manager has not established that the use of multiple transmitter sites with fewer than ten channels at each site would be a more efficient use of the spectrum as did AMDC. Nor would permitting the licensee to establish multiple transmitter sites under these circumstances increase the competiveness of the SMR industry. Thus, the public interest objectives of our partial assignment multiple transmitter policy that were facilitated by allowing AMDC to construct multiple transmitter sites are not facilitated in this case.

[9] Because we deny the licensee's system manager's request to split the system's channels, we do not reach the question of whether the channels would receive continued protection at a site where the channels are not constructed or whether the construction of the different channels at two separate sites would violate 47 C.F.R. §90.627(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-120

In re Applications of

Kenneth R. Carberry, *et al.* d/b/a NORTHAMPTON MEDIA ASSOCIATES
Northampton, Massachusetts — File No. BPH-831216AJ

CUTTER BROADCASTING, INC.
Northampton, Massachusetts — File No. BPH-840518IB

For Construction Permit
for a New FM Station

ORDER

Adopted: June 27, 1989; Released: July 13, 1989

By the Commission:

1. The Commission has before it: (a) a Contingent Application for Review filed September 28, 1988 by Cutter Broadcasting, Inc. (Cutter); (b) an Opposition thereto filed October 14, 1988 by Northampton Media Associates (NMA); (c) an Application for Review filed October 3, 1988 by NMA; (d) an Opposition thereto filed October 13, 1988 by Cutter; and (e) an Erratum to Application for Review filed October 31, 1988 by NMA. These pleadings relate to a decision of the Review Board which granted the application of Cutter to construct a new Class A FM radio station at Northampton, Massachusetts. *Northampton Media Associates*, 3 FCC Rcd 5164 (1988).

2. We will deny NMA's application for review. Several matters, however, warrant brief comment. Relying on *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988), Cutter contends that the Board should have awarded it 100 percent quantitative integration credit rather than only 65 percent for the full-time managerial position of Cutter's owner, Carol Cutting. We need not decide the impact, if any, of *Victory Media* on the quantitative integration award given Cutter in this proceeding. The Board has held, and we agree, that Cutter is the comparatively superior applicant solely under the diversification criterion, notwithstanding the respective integration proposals of the applicants. 3 FCC Rcd at 5172-73 ¶ 49. Indeed, NMA has conceded as much in the earlier stages of this case. *Id* at 5171 ¶ 37. Notwithstanding that, Cutter is the clear winner based on the quantitative integration award it has already received in this proceeding -- 65 percent versus 0 percent for NMA. Moreover, it has the edge over NMA under the qualitative integration attributes of local residence, civic participation, and minority and female ownership, and Cutter's auxiliary power proposal gives it yet another preference. *Id.* at 5172 ¶ 48. In view of the foregoing, we find that the ultimate outcome of this comparative licensing proceeding would not be materially affected by *Victory Media* and that, therefore, the resolution of this matter is of no decisional significance here.

3. In an opposition pleading to Cutter's contingent application for review, NMA contends that Cutter has engaged in egregious misrepresentations and/or misconduct in this proceeding which amounts to deceitful gamesmanship with the Commission's adjudicatory processes. If such misconduct does not require absolute disqualification, NMA contends, it should at a minimum require the imposition of a decisionally significant comparative demerit against Cutter. Hence, NMA submits that the Commission should take this opportunity to revisit its policy of refusing to impose comparative demerits for such misconduct, as enunciated in its policy statement regarding *Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1230-32 ¶¶ 110-114 (1986), and find that the type of misconduct engaged in by Cutter does indeed justify the imposition of a dispositive comparative demerit in this case or in any other similarly situated case.

4. We find NMA's contention to be unpersuasive for several reasons. To begin with, it is procedurally defective in that the argument has been improperly raised in an opposition pleading. Because it is founded on erroneous assumptions about the record and the case law, however, a brief response is in order. In this regard, NMA's version of Cutter's misconduct in this case -- egregious misrepresentations and deceitful gamesmanship with the Commission's processes -- is simply not supported by the evidence as compiled on the record of this proceeding. Both the Administrative Law Judge and the Board have concluded that there is no evidence whatsoever to suggest that Cutter has engaged in such misconduct. 3 FCC Rcd at 579-80 ¶ 73 and 3 FCC Rcd at 5172 ¶ 45. We agree with those determinations based on our review. Consequently, finding that NMA's argument is grounded on an erroneous premise, it necessarily follows it does not support the purported relief here requested; *i.e.*, a reexamination of the Commission's *Character Policy Statement, supra.* In any event, had Cutter engaged in the serious misconduct of which NMA claims it did, it would not require us either to eliminate or to modify the Commission's *Character Policy Statement* to reach a just result in this case. That *Policy Statement* does not exempt such misconduct from Commission consideration. Rather, it makes clear that the Commission will continue to be concerned with misrepresentations by applicants and, if found to be egregious, will justify disqualification.

5. There is one final matter which warrants discussion. We agree with the Review Board that Cutter is financially qualified, and that it did not falsely certify its financial qualifications. Based upon the principals' general business experience, their knowledge of the community, the experience of Cutter's 20 percent owner and principal, Eric Reid, in developing a financial plan for station WERV (Rotterdam, New York), and the advice of a consulting engineer, Cutter determined that it needed $38,836 to construct and operate for three months without station revenues. Cutter Fin. Ex. 1 at 5-6; 3 FCC Rcd at 5165-66 ¶¶ 7-8, 11. To meet these estimated expenses, the applicant relies exclusively on the personal resources of

Cutter's 80 percent principals, Carol and Bruce Cutting. Tr. at 457, 476, 600, 699; Cutter Ex. 1 at 2; Joint Ex. 2 at 36-39.

6. Reid signed the application, thereby affirming the accuracy of the certification of Cutter's financial qualifications. Substantial evidence in the record reflects that Reid had reasonable assurance of sufficient funds to construct and operate the proposed station for three months without revenue when he certified that Cutter was financially qualified. Before Cutter's application was filed, all three of its principals read and understood FCC Form 301. Initial Decision, 3 FCC Rcd at 575 ¶ 52; Tr. at 464, 605, 645, 688. Having read the attached instructions, each principal was aware that FCC Form 301 requires that "[a]n applicant for a new station must attest it has sufficient net liquid assets on hand, or committed sources of funds to construct the proposed facility and operate for three months, without revenue." *Revision of Application for Construction Permit for Commercial Broadcast Station*, 50 RR 2d 380, 388 (1981). Tr. at 458, 597, 688; 3 FCC Rcd at 575 ¶ 52.

7. Before certifying Cutter's financial qualifications, Reid consulted the applicant's 80 percent equity owners, Carol and Bruce Cutting. Tr. at 465-66; 477. Based upon a thorough review of their personal resources, Carol and Bruce Cutting concluded that they possessed sufficient assets to generate the net liquid assets needed to construct and operate the proposed station for three months. Tr. 463, 604-05, 688-89; Cutter Fin. Ex. 1 at 3; Cutter Fin. Ex. 2 at 2-3. Accordingly, Carol and Bruce Cutting orally agreed to finance the application and assured Reid that they had sufficient resources to do so. Tr. 377-78, 600-01, 618, 700-01; Cutter Exh. 1; Cutter Fin. Exh. at 6-7. In doing so, Bruce Cutting made it clear to Reid that they did not have unlimited financial resources, but that they could afford to fund a "modest" proposal of not more than $50,000. Tr. at 622. 3 FCC Rcd at 5166 ¶ 12.

8. When Reid signed the application, he had not seen a balance sheet or other written evidence documenting the Cuttings' ability to meet this commitment. Tr. at 465-66; Cutter Fin. Ex. 1 at 8; Cutter Fin. Ex. 3 at 5. As a long-time personal friend of the Cuttings, however, Reid had visited their home, and had personal knowledge of the Cuttings and of their reputation in the community. Thus, Reid testified that he had no reason to doubt their assurance that they had sufficient resources to finance the application. Tr. at 465-67, 477; 3 FCC Rcd at 577 ¶ 62. Moreover, a balance sheet, prepared after Reid signed the application reflects that *at the time of certification*, the Cutters had net liquid assets of $70,000 and a net worth of more than $615,000. As the Board found, 3 FCC Rcd at 5167 ¶ 16, this was more than enough under Commission precedent to meet estimated expenses of only $38,836. *See Kaye - Smith Enterprises*, 98 FCC 2d 675, 678 ¶¶ 6-7 (1984), recon. denied, 98 FCC 2d 670 (Rev. Bd. 1984), review denied, FCC 85-192 (released April 19, 1985). Finally, the Cuttings, by taking an active role in preparing and reviewing the accuracy of the application (including the certification of financial qualifications) before it was filed, effectively ratified the certification. 3 FCC Rcd at 5168 ¶ 22.

9. To the extent that the Review Board suggests, 3 FCC Rcd at 5167 ¶ 18, that the certification was technically deficient because the Cuttings did not make a written commitment to fund the applicant and because Reid did not rely on a balance sheet or other written documentation of the Cuttings' ability to meet this commitment, we disagree. As explained below, the reasonable assurance standard governing Cutter's application does not necessarily require contemporaneous written documentation.

10. Prior to 1981, the Commission required broadcast applicants to submit, with their applications, extensive written documentation supporting their financial qualifications, including "a detailed itemization of projected expenditures and sources of funds, . . . a balance sheet, a statement of yearly income and assorted documentations." *See, e.g., Revision of Form 301*, 50 RR 2d 381, 382 ¶ 6 (1981). Where an applicant was relying on individuals rather than financial institutions for funds, the applicant also had to demonstrate sufficient liquid assets to enable that individual to meet his financial commitment to the applicant. *See Midwestern Broadcasting Co.*, 15 FCC 2d 720, 721-22 ¶ 5 & n.1 (1968). Thus, as the Board has observed, written documentation was at that time the *sine qua non* for financial qualifications. *Las Americas Communications, Inc.*, 1 FCC Rcd 786, 788 ¶ 10 (Rev. Bd. 1986), applications for review pending. And, if a broadcast applicant failed to submit all the required documentation, a financial issue was specified against that applicant.

11. In an effort to expedite the processing of broadcast applications, the Commission revised FCC Form 301 in 1981 to permit applicants to certify, rather than document, their financial qualifications. *Revision of Form 301*, 50 RR 2d 381, 382 ¶ 6 (1981). The 1981 version of FCC Form 301, which was in effect when Cutter filed its application, provides that "[d]ocumentation supporting the attestation of financial qualification need not be submitted with this application but must be available to the Commission upon request." *FCC Form 301*, 50 RR 2d at 388 (Section III Instructions ¶ C).

12. The question before us is whether, under the 1981 version of Form 301, such documentation must exist at the time of the certification or whether it may be subsequently generated to support an earlier certification. It is undisputed that the Commission did not change its substantive financial requirements when it adopted the financial certification procedure. *Revision of Form 301*, 50 RR 2d at 382 ¶ 6 ("[I]t should be reemphasized that we are not, in any way, modifying the underlying substantive financial criteria -- ability to construct and operate the proposed facility for three months"). *See also Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, 2 FCC Rcd 2122 (1987); *South Florida Broadcasting Co.*, 94 FCC 2d 452, 455 ¶ 6 (1983).

13. Thus, a broadcast applicant filing in accordance with *Revision of Form 301* still must have reasonable assurance of having sufficient funds to construct the proposed station and operate it without revenue for three months before the applicant certifies its financial qualifications. In other words, the applicant may not certify its financial qualifications and then arrange financing. *Pepper Schultz*, 103 FCC 2d 1052, 1058-59 ¶ 11 (Rev. Bd. 1986), review denied, 2 FCC Rcd 1476 (1987), recon. granted in part, FCC 3 FCC Rcd 1200 (1988).

14. Nevertheless, as the Commission explained in *Certification of Financial Qualifications*, 2 FCC Rcd at 2122, the certification procedure was designed to "spare[] [applicants] the time and effort necessary *to prepare* and submit the documentation previously required to demonstrate their qualifications." (emphasis added). In this manner, the certification procedure was intended to "provide[] significant benefits both to applicants and to the

Commission." *Id.* Cf. *Metromedia Radio & TV*, 102 FCC 2d 1334, 1350-52 ¶¶ 30-32 (1985) (usual practice is not to require the assignee, who certified its financial qualifications, to produce the detailed documentation that would have been required prior to 1981). Thus, we conclude that, under the 1981 requirements governing certification cases like the one before us, reasonable assurance does not necessarily require that an applicant have the written documentation (which would have been required before the 1981 revision of FCC Form 301) when it certifies its financial qualifications. Although the supporting documentation must be produced upon the Commission's request, the applicant may prepare and submit it after certification, provided that the applicant actually had a reasonable assurance of adequate funds at the time of certification.

15. In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of funds to meet these estimated expenses, the applicant must provide substantial and reliable evidence showing "sufficient net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue," as the 1981 version of Form 301 requires.

16. Probative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds. For example, uncontroverted affidavits or testimony establishing an oral contract to lend money would suffice to demonstrate a committed source of funds. Where the lender is not a financial institution but a person, as in this case, the applicant must show that the person proposing to lend the funds had the necessary financial resources at that time. In such a case, we believe that a balance sheet or other documentary evidence (such as a financial statement) demonstrating that, at the time of certification, that person had sufficient net liquid assets to meet his financial commitment to the applicant would be clear evidence to support the certification. *See Armando Garcia*, 3 FCC Rcd 1065, 1066 ¶ 11 (Rev. Bd.), review denied, 3 FCC Rcd 4767 (1988) (financial certification issue not warranted where applicant that was relying on availability of spouse's pension plan produced written documentation from the pension plan showing the value of the plan at the time of certification, as well as a statement from the spouse of her intention to retire).

17. As detailed in paragraphs 5-8 above, the record in this case contains substantial reliable evidence reflecting that Reid had reasonable assurance of the applicant's financial qualifications when he signed the application. Before filing the application, the Cuttings conferred with Reid, an experienced broadcaster, and a consulting engineer to discuss what it would cost to construct and operate for three months. Based on these discussions, Cutter developed a modest financial plan that would enable the Cuttings to fund the application. The unrebutted testimony of the Cuttings corroborates Reid's claim that they orally agreed to fund the application. Reid was a long time friend of the Cuttings who was aware of their standing in the community and had no reason to doubt their assurance that they were financially qualified. Although the Cuttings did not furnish Reid with a written balance sheet prior to certification demonstrating their financial ability to meet estimated expenses of $38,836, a subsequently constructed balance sheet reflects that *at the time of certification*, the Cutters had net liquid assets of $70,000 and a net worth of more than $615,000. This was sufficient under Commission precedent to support the certification.

18. As this proceeding acutely demonstrates, comparative hearings would be greatly simplified if all applicants had written documentation of their financial qualifications at the time of certification. Accordingly, the Commission adopted a Report and Order in General Docket No. 88-328 on March 30, 1989, which revised Form 301 to strengthen the financial certification requirements. *Revision of Application for Construction Permit for Commercial Broadcast Station*, 4 FCC Rcd 3853 (1989). There, the Commission retained the requirement that a broadcast applicant check whether or not it has "sufficient net liquid assets on hand or . . . available from committed sources to construct and operate the requested facilities for three months without revenue." 4 FCC Rcd at 3859 ¶ 42. In order to ensure that applicants are correctly certifying their financial qualifications, however, the Commission revised its application form to require that applicants also submit cost estimates and identify each source of funds. *Id.* Under the revised form, a broadcast applicant need not submit the underlying documentation to verify its cost estimates and funding sources at the time of certification, but it must actually have such documentation on hand when it submits its application. 4 FCC Rcd at 3859 ¶ 43.

19. By the express terms of the Report and Order the amendments to Form 301 did not become effective until June 26, 1989, when they were approved by the Office of Management and Budget. 4 FCC Rcd at 3861 ¶ 61. Thus, the new certification requirements adopted on March 30, 1989, do not apply to any applications, such as those before us in this proceeding, filed before June 26, 1989. Based upon our review of Commission precedent, we conclude that, under the provisions of the Form 301 in effect before that date, oral loan agreements are not presumptively invalid and supporting documentation need not necessarily be in existence at the time of certification. Nevertheless, applicants already on file before June 26, 1989 can expedite the resolution of any financial certification question by having available the type of written documentation described in paragraph 16 above.

20. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g) the Contingent Application for Review filed September 28, 1988 by Cutter Broadcasting, Inc. IS DISMISSED and the Application for Review filed October 3, 1988 by Northampton Media Associates IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-236

In re Applications of

SUSAN S. MULKEY	File No. BPCT-850320KF
KOONTZ COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPCT-850320KH
FAMILY 55 TV, INC.	File No. BPCT-850320KI
CATAWBA COMMUNICATIONS, INC.	File No. BPCT-850320KJ
NEISLER LIMITED PARTNERSHIP	File No. BPCT-850320LE
METROLINA MEDIA, INC.	File No. BPCT-850320LF

For Construction Permit
for a New Television
Station at Rock Hill,
South Carolina

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 1989; Released: July 13, 1989

By the Commission:

1. Six applicants remain in this comparative proceeding for a new UHF Television Station at Rock Hill, South Carolina. Five of the applicants, Susan S. Mulkey, Koontz Communications Limited Partnership, Family 55 TV, Inc., Neisler Limited Partnership, and Metrolina Media, Inc., claim credit for 100 percent integration. Catawba Communications, Inc., did not submit an integration proposal. In a Decision, *Moore Broadcast Industries, Inc.*, 2 FCC Rcd 2754 (ALJ 1987), the ALJ denigrated each of the integration proposals and granted Neisler's application, awarding it credit for 51 percent integration. The Review Board rejected each of the integration proposals and awarded no integration credit. It concluded that the integration proposals filed by Mulkey, Family 55, Neisler and Metrolina are shams. The Board granted Koontz's application because of its superior coverage proposal. 3 FCC Rcd 590 (Rev. Bd. 1988). Both the ALJ and the Board found that Metrolina was not qualified to be a licensee under a financial certification issue.

2. Now before the Commission are Applications for Review filed March 10, 1988 by Mulkey, Family 55, Catawba, Metrolina and Neisler; a Motion to File Supplement and Supplement both filed on April 25, 1988 by Neisler; and Oppositions filed March 23, 1988 by Mulkey, and March 25, 1988 by Neisler and Koontz. On April 5, 1988 Neisler filed a Motion to Strike or, in the Alternative, Reply to Opposition to Application for Review. On April 7, 1988 Metrolina filed a Motion to Strike and/or Leave to Reply. Neisler and Metrolina argue in their motions to strike that Mulkey and Koontz raised new matters in their opposition pleadings. On April 15, 1988 Koontz filed an Opposition to the Motions to Strike.

3. Each of the applicants other than Catawba argues that it is entitled to credit for 100 percent integration and that it should be preferred under the standard comparative issue. Catawba argues that it should be preferred because of the infirmities in the integration proposals of each of the other applicants. Metrolina argues that the ALJ and the Board erred in finding that it is not qualified to be a licensee. We will grant Family 55's application for review and modify the Board's resolution of questions relating to Family 55's financial certification, integration proposal, coverage, and the comparative evaluation.

4. *Family 55's Integration:* Family 55 is a corporation. It claims 100 percent integration credit for the participation of its sole voting shareholder, Diane Wells, who has a 10 percent equity interest. The ALJ attributed the 90 percent non-voting interest of Jonathan Byrd to Family 55 because of his involvement in Family 55's application. The ALJ credited Family 55 with only 10 percent integration. 2 FCC Rcd at 2766 ¶¶ 143-144. The ALJ found that Mr. Byrd conceived the idea of filing the application, recruited Ms. Wells as a principal, located the proposed antenna site and initially contacted the site owner, provided the cost estimates for the application, and will finance the application, including possibly loaning Ms. Wells money to purchase her equity interest in the application. 2 FCC Rcd at 2766 ¶¶ 143-144. The Board affirmed the ALJ's factual findings, but concluded that Family 55 was not entitled to any integration credit. 3 FCC Rcd at 592 ¶ 11. The Board found that Family 55's proposal is a "classic" corporate sham, citing *KIST Corp.*, 102 FCC 2d 288 (1985).

5. In assessing integration proposals, we do not generally consider the ownership interests of "passive" investors, such as non-voting shareholders or limited partners. *Victory Media, Inc.*, 3 FCC Rcd 2073, 2074-75 ¶ 18 (1988); *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), recon. granted in part and denied in part, 58 RR 2d 604 (1984), further recon granted in part, 1 FCC Rcd 802, 803-04 nn. 31-32 (1986); *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 ¶ 15 (1981). Non-voting shareholders generally lack the power to control corporate activities. *Victory Media*, 3 FCC Rcd at 2074 ¶ 14, citing *Ownership Attribution*, 97 FCC 2d at 1020-21. Moreover, we held in *Victory Media* that the role played by non-voting shareholders in the formation of an applicant is not necessarily dispositive of whether the applicant, once established, will be secretly managed by its passive investors. 3 FCC Rcd at 2073-74 ¶¶ 8-9. We have also recognized that there may be legitimate business reasons for creating a corporation with non-voting classes of stock. We have, therefore, refused to hold that such arrangements are presumptively invalid for integration purposes. *Victory Media*, 3 FCC Rcd at 2075 ¶ 19. Nevertheless, we do not hesitate to

discredit an integration proposal where convincing evidence reflects that the non-voting stockholder will exercise an active, rather then a passive role in the ongoing business. *Victory Media*, 3 FCC Rcd at 2074-75 ¶ 18.

6. In *KIST* we found that the integration proposal was a sham when the nominal controlling owner had no investment in the application, was not involved in the application and there was little likelihood she would be involved in the station in the future. We also rejected as "incredible" the applicant's claim that the principal who was responsible for the financing of the proposal made a legitimate gift of a 95 percent interest to the nominal controlling owner. 102 FCC 2d at 292, ¶¶ 7 and 8. We do not, however, agree with the Board that *KIST* is controlling here. Unlike the principal who was financing the application in *KIST*, Mr. Byrd has retained a 90 percent equity interest in Family 55. The record also establishes that Ms. Wells holds a legitimate interest in the applicant. After discussing the division of equity with Mr. Byrd, she elected to acquire a 10 percent interest. She testified that a 10 percent equity interest represented a level of financial commitment that she felt comfortable with. Tr. at 689, 707. Part of her stock was in return for services actually rendered. Tr. at 783. Although she borrowed the money to purchase a portion of her stock from Mr. Byrd, Ms. Wells signed an interest bearing promissory note that will come due in 5 years. Tr. at 694, 773. Ms. Wells testified that she will repay the note even if Family 55 is not successful in securing a license. Tr. at 773.

7. Moreover, unlike the nominal controlling principal in *KIST*, Ms. Wells is responsible for the prosecution of the application and the management of the applicant. She retained local counsel. Tr. at 742. She and local counsel decided that the applicant should be a corporation, she consulted with communications counsel and applicant's engineer, she decided to lease the antenna site, and she arranged for the lease. Tr. at 697-700, 760. Ms. Wells helped counsel draft the application and she certified Family 55's financial qualifications. Tr. at 731. She set up a bank account for Family 55, she is the only person authorized to sign checks, and she receives and pays all bills. Tr. at 768-70. Under these circumstances, it is clear that Ms. Wells has been responsible for the prosecution of Family 55's application and the record does not support a conclusion that the corporate structure is a sham.

8. Nor is Mr. Byrd's interest attributable to Family 55 for comparative purposes. Not only does Mr. Byrd own only non-voting stock, but his involvement ceased with the organization of the applicant. The ALJ and the Board cited no evidence of post organizational activity that would rebut Family 55's showing that Mr. Byrd is a passive investor. Mr. Byrd testified that he is interested in family and religious programming. He tries to locate partners to run the stations in which he invests by contacting local clergy. Tr. at 849. Mr. Byrd agreed to invest only after meeting with Ms. Wells. He testified that he will only invest in a station if he can find a person to run the station with whom he is comfortable. Tr. at 857. He also stated that he would not act until he assures himself that the person is not going to change after he makes a commitment and gives up control. Tr. at 885-86. Any post organizational contacts with Mr. Byrd have been confined to capital calls and preparing for depositions. Tr. at 774. Thus, although Mr. Byrd was active in organizing Family 55 and laying the groundwork for the application, he has confidence in and will rely on Ms. Wells. Based on the record before us, she is the only principal of Family 55 who is active in the application and will be active in the management of the proposed station. Family 55 is entitled to 100 percent credit for Ms. Wells' integration. That integration is enhanced by her status as a minority female, civic activities, and both past and future local residence.

9. *Comparative Coverage:* Koontz will serve 2,207,580 persons while Family 55 will serve 2,171,374 persons. They serve about 49 percent more people than Mulkey and are entitled to a slight preference over Mulkey for their superior coverage proposals, as well as a very slight preference over Neisler which will serve only 1,727,364 persons. 2 FCC Rcd at 2767 ¶ 150. The ALJ concluded that the difference between Family 55's and Koontz's coverage proposals is statistically insignificant. *Id.* Recognizing that the difference in the proposals is slight, the Board found Koontz's slight advantage to be decisional. 3 FCC Rcd at 593 ¶ 24. We do not agree. In light of the fact that Koontz proposes a fifth television service for only 291 persons more than Family 55 and that the remaining 31,915 persons to be served by Koontz, but not Family 55, already receive five or more television signals, the differences between these two coverage proposals are not of decisional significance. *See Simon Geller*, 90 FCC 2d 250, 276 ¶ 50 (1982), subsequent history omitted.

10. *Final Comparative Evaluation:* The Board rejected Mulkey's and Neisler's integration proposals as shams. They both argue that they are entitled to 100 percent integration credit. We need not, however, reach these questions. Even if Mulkey and Neisler were entitled to 100 percent integration credit, Family 55 would prevail. Family 55 has no attributable media interest and no other applicant is entitled to a preference over it on the diversification criterion. 2 FCC Rcd at 2764 ¶ 131. Under the enhancement factors, Mulkey and Family 55 would both be entitled to 100 percent credit for minority and female ownership and for proposed local residence, but Family 55 is also entitled to 100 percent credit for past local residence and civic activities. Compare 2 FCC Rcd at 2765 ¶ 140 with 2 FCC Rcd at 2766 ¶ 144. In addition Family 55 is entitled to a slight coverage preference over Mulkey, based on its superior proposal. 2 FCC Rcd at 2767 ¶ 150. When Family 55's credits for past local residence and civic activities are combined with its slight coverage preference, it is clear that Family 55 must be comparatively preferred over Mulkey in this proceeding.

11. A comparison of the enhancement factors pertinent to Family 55 and Neisler leads to the same conclusion. Although both applicants would be entitled to credit for female ownership, Family 55 is also entitled to credit for its minority ownership and for its past local residence, civic activities and proposed local residence, in contrast to Neisler's past service area residence, civic participation, and proposed area residence. Compare 2 FCC Rcd at 2766 ¶ 144 with 2 FCC Rcd at 2766-67 ¶ 148. In addition, Family 55 is entitled to a slight coverage preference over Neisler, based on its superior proposal. 2 FCC Rcd at 2767 ¶ 150. Thus, Family 55's credits for minority ownership, past local residence, civic activities, and proposed local residence, combined with its slight coverage preference, are clearly superior to those of Neisler.

12. The ALJ refused to credit Koontz's integration proposal. 2 FCC Rcd at 2765-66, ¶¶ 141-142. Although the Board granted Koontz's application, it also affirmed the ALJ's findings and refused to credit Koontz's integration proposal. 3 FCC Rcd at 592 ¶¶ 13-14. Koontz waived its

right to seek judicial review of those findings by failing to file an application for review of the Board's ruling. 47 C.F.R. § 1.115 (k). Koontz in its oppositions to the applications for review filed by the other applicants argues that the ALJ and Board erred in refusing to credit its integration proposal. Neisler and Metrolina moved to strike Koontz's oppositions.

13. It is inappropriate to raise new issues in an opposition to an application for review. Such a practice tends to undermine the specified pleading procedure and deprives other parties of an opportunity to respond. Cf. *Newhouse Broadcasting Corp.*, 61 FCC 2d 528, 529 (1976), recon. granted in part, 73 FCC 2d 186 (1979). If Koontz wished to challenge the Board's decision in any respect, it should have filed an Application for Review or a Contingent Application for Review. The motions to strike will be granted and those portions of Koontz's oppositions that are not responsive to the arguments raised in the applications for review will be dismissed.[1] In any event, even if Koontz established that its integration proposal were entitled to 100 percent credit, it would not be decisionally significant because Family 55's enhancement credits for female ownership, past local residence, and civic activities would be preferred over Koontz's credit for broadcast experience. Compare 2 FCC Rcd at 2766 ¶ 144 with 2 FCC Rcd at 2766 ¶ 142. *See* also *Jerome Thomas Lamprecht*, 3 FCC Rcd 2527 ¶ 2 (1988). Under these circumstances, no further consideration is warranted of Koontz's proposal.

14. *Financial Certification:* In its Decision, the Board asserted that there is an unresolved question concerning Family 55's application because Ms. Wells had no supporting documentation on hand when she certified that the applicant was financially qualified. 3 FCC Rcd at 592 ¶ 16.[2] As we stated in *Northampton Media Associates*, 4 FCC Rcd _____, _____ ¶ 14 (1989), reasonable assurance does not necessarily require that an applicant have written documentation when it certifies its financial qualifications. Although the supporting documentation must be produced upon the Commission's request, an applicant may prepare and submit it after certification, provided that the applicant had a reasonable assurance of adequate funds at the time of certification.

15. In this case, Urban Broadcasting Ltd., a former applicant, filed a Petition to Enlarge Issues on February 26, 1986 against Family 55, alleging *inter alia* that deposition testimony made it clear that Ms. Wells did not have appropriate documentation when she certified Family 55's financial qualifications. In an Opposition filed March 13, 1986, Family 55 asserted that Mr. Byrd is financially capable of supplying and is committed to loaning any funds necessary to construct and operate the proposed station for 90 days without revenues. Declarations under penalty of perjury from both Ms. Wells and Mr. Byrd verified the accuracy of statements contained in the Opposition.

16. To support its contention that the certification was valid, Family 55 noted that Ms. Wells certified the applicant's financial qualifications only after a lengthy conversation with Mr. Byrd. According to Family 55, Mr. Byrd assured Ms. Wells that he had sufficient funds to finance the application and supplied Ms. Wells with the names of individuals who could verify his ability to do so. Family 55 urged that these conversations provided at least as much assurance as an unaudited balance sheet, which Family 55 claims would have been acceptable even before the certification procedure was adopted. In addition, Family 55 claimed that Ms. Wells had recently obtained oral assurances from an investment banker who had personal knowledge of Mr. Byrd's financial holdings. In reply, Urban argued that Family 55 had not provided a narrative statement concerning the applicant's financial proposal from either principal and that there had not been any demonstration of Mr. Byrd's ability to fund the Rock Hill station and also serve as a source for $2,600,000 in funding for a then pending application for a new San Antonio, Texas station.

17. In our view, uncorroborated oral assurances are not sufficient to resolve all questions concerning the validity of the financial certification. In this regard, the Commission held in *Northampton Media Associates*, 4 FCC Rcd at _____ ¶ 16, that:

> Probative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds. For example, uncontroverted affidavits or testimony establishing an oral contract to lend money would suffice to demonstrate a committed source of funds. Where the lender is not a financial institution but a person, as in this case, the applicant must show that the person proposing to lend the funds had the necessary financial resources at that time. In such case, we believe that a balance sheet or other documentary evidence (such as a financial statement) demonstrating that, at the time of certification, that person had sufficient net liquid assets to meet his financial commitment to the applicant would be clear evidence to support the certification.

Here Family 55 did not rely upon sworn affidavits from Ms. Wells and Mr. Byrd verifying an agreement at the time of certification to finance the application. Nor did it submit any documentary evidence establishing Mr. Byrd's ability to fund the application at the time of certification. In light of our holding in *Northampton*, we therefore believe that it is appropriate to afford Family 55 an opportunity to submit further documentation concerning Mr. Byrd's ability and commitment to provide the funds supporting Family 55's certification of its financial qualifications. Thereafter, the other parties may file a response to Family 55's further showing.[3]

18. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike or, in the Alternative, Reply to Opposition to Application for Review, filed April 5, 1988 by Neisler Limited Partnership, and the Motion to Strike and/or Leave to Reply, filed April 7, 1988 by Metrolina Media, Inc. ARE GRANTED to the extent indicated herein; and the Opposition pleadings filed by Koontz Communications Limited Partnership and by Susan S. Mulkey ARE DISMISSED to the extent indicated herein.

19. IT IS FURTHER ORDERED, That the Application for Review filed March 10, 1988 by Family 55 TV, Inc., IS GRANTED and the Decision of the Review Board, *Susan S. Mulkey*, 3 FCC Rcd 590 (1988) IS MODIFIED to the extent indicated herein; that Family 55 MAY FILE a further submission in accordance with paragraph 17, above, within 15 days after the release of this Memorandum Opinion and Order; and that the other parties MAY FILE a response thereto within 10 days thereafter.[4]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] To the extent that Mulkey's Opposition raises new matters not responsive to Metrolina's Application for Review, it will also be dismissed.

[2] The Review Board also raised a question concerning Mulkey's basis for certification of her financial qualifications. 3 FCC Rcd at 593 ¶ 18. In light of our proposed resolution of this proceeding, no consideration of that question is required at this time.

[3] Although the Board's Decision found that Metrolina had no documentation of any kind to support its financial certification, 3 FCC Rcd at 591 ¶ 9, its further holding quoting the ALJ in the same paragraph "that the record clearly demonstrated that 'at the time the application was filed Metrolina had no financial plan, in terms of costs or sources of revenue . . .'" provides ample basis for denial of Metrolina's application. *Northampton Media Associates*, 4 FCC Rcd _____, _____ ¶ 13 (1989).

[4] In light of the further proceedings ordered herein, this Memorandum Opinion and Order does not contain a final ruling on the Applications for Review of either Family 55 or the other competing applicants.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-528

In the Matter of

AMERITECH OPERATING COMPANIES
Tariff F.C.C. No. 2

Transmittal Nos. 206, 220, and 225

MEMORANDUM OPINION AND ORDER

Adopted: November 2, 1988; Released: November 2, 1988

By the Deputy Chief, Common Carrier Bureau:

I. BACKGROUND

1. On August 5, 1988, the Ameritech Operating Companies (Ameritech) filed the captioned tariff revisions proposing to increase or reduce certain switched access and special access recurring rates charged by Illinois Bell Telephone Company (Illinois Bell), which in aggregate would increase Illinois Bell's revenues by some $36.3 million.[1] Ameritech Description and Justification (D&J), Exhibit 1-1, p. 2. Ad Hoc Telecommunications Users Committee (Ad Hoc) and MCI Communications Corporation (MCI) filed petitions to reject or suspend the revisions, Metropolitan Fiber Systems, Inc. (MFS) filed late a letter seeking rejection, and Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Company, Inc. (Networks) filed comments jointly.[2] Ameritech filed a reply, with a motion for acceptance of the late-filed reply, and a letter replying to the MFS letter.[3] Ameritech also submitted a supplemental response to informal inquiries from the staff. Transmittal No. 206 is scheduled to become effective on November 3, 1988.

II. DESCRIPTION OF FILING

A. *In General*

2. Ameritech asserts that Illinois Bell is underearning in both the traffic sensitive switched access and special access rate categories. *Id.* at 1. It claims that the switched access underearning is caused by revenue requirements higher than forecast, which are only partially offset by higher than projected demand. *Id.* at 1-2. The underearning for special access, Ameritech continues, is caused by increased revenue requirements and lower than forecast demand. *Id.* at 2. It attributes the increases in revenue requirements for switched and special access to increased total company expenses, to the introduction of updated separations studies, and to use of a revised Dial Equipment Minute (DEM) allocation factor. *Id.* at 2.

3. Ameritech projects Illinois Bell's interstate access revenue requirement to be $54.1 million greater than forecast in the annual filing, with $16.5 million representing increased interstate expense and $37.8 million representing separations changes. *Id.* at 4. Ameritech proposes to increase switched access rates by 8.9 percent overall; to increase local switching rates by 11.9 percent; to increase local transport category rates by 11.6 percent; and to reduce directory assistance rates by 34.7 percent. *Id.* at 24. Ameritech also proposes to increase by 11.8 percent the special access category rates for metallic, telegraph, voice grade, and program audio services. D&J at 29. It projects that the switched access rate increases would produce additional revenues of $22.8 million, while special access rate increases would generate additional revenues of $14.3 million. *Id.* at Exhibit 1-1, p. 2. Ameritech contends that the proposed revision in switched access rates will enable Illinois Bell to earn a 12 percent annualized rate of return for the remainder of 1988. *Id.* In contrast, the revision for special access rates will not yield a 12 percent rate of return because Ameritech is not increasing rates for high capacity, digital data, analog special access, or video services. *Id.* at 29.

4. Ameritech expects Illinois Bell's 1988 earnings to be 10.1 percent overall, with 9.7 percent for switched and 8.1 percent for special access services, if the proposed rate changes are allowed to take effect. *Id.* It claims that Illinois Bell has implemented intrastate rate reductions and refunds that correspond to the implementation of the new separations studies, and states that Illinois Bell will implement the intrastate rate restructure plan in the fourth quarter of calendar year 1988. *Id.* at 3-4.

B. *Separations Changes*

5. Two separations changes, Ameritech avers, resulted in a net increase in the total interstate access revenue requirement of $37.8 million. Of this amount, $22.5 million was caused by the first change -- the introduction of several new separations studies, respectively dealing with circuit equipment, service center activity, and conversation minute miles. *Id.* The second change, updating the projected DEM allocation factor, accounts for a $15.4 million increase, Ameritech asserts. *Id.*

1. *Circuit equipment study (CES).*

6. According to Ameritech, implementing the new circuit equipment study (CES) increases the total interstate access revenue requirement by $9.6 million; the CES revenue requirement increases by service category are $6.9 million for special access and $5.6 million for common line, while its switched access revenue requirement decreased by $2.8 million. *Id.* at 8. Ameritech declares that the CES analyzed the usage of the "central office -category 4" investment and categorized it into the subsidiary separations categories for apportionment.[4] It states that the circuit equipment was assigned to subsidiary categories as specified in Section 36.126(b), 47 C.F.R. § 36.126(b).[5] *Id.* at 8-9. Ameritech introduced the revised basic study factors into the separations process in the January 1988 data month. *Id.*

2. *Service Center Activity*

7. Ameritech states that the estimated increase in the net interstate access revenue requirement resulting from the new service center activity (SCA) cost allocation study (formerly Account 645 expense study) is $6.4 million, with a $3.7 million increase in common line, a $3.2 million increase in switched access and a decrease in

special access of $0.6 million. *Id.* It claims that the service center activity study was performed to develop factors used to allocate the monthly account 6623 (Customer Services) expenses related to end user and interexchange carrier service order processing and billing inquiry to the interstate jurisdiction. *Id.* at 11.[6]

3. *Conversation Minute Miles*

8. Ameritech states that the new conversation minute miles (CMM) study introduced into the separations process in the January 1988 data month increased the total interstate access revenue requirement by $6.5 million. This net effect reflects a switched access revenue requirement increased by $7.4 million, a common line revenue requirement reduced by $0.9 million, and an unchanged special access revenue requirement. *Id.* In compliance with Section 36.156(b) of the Rules, 47 C.F.R. § 36.156(b), Ameritech explains, it used conversation minute miles per originated message basic study factors to apportion the monthly book costs associated with jointly used or shared use toll message circuits. *Id.* at 12. It also submits that the CMM study was performed to develop updated factors that would consider events such as the rehoming of toll offices and a rate restructuring within Illinois that recategorized intrastate messages from toll to local. *Id.*[7]

4. *Dial Equipment Minutes*

9. Ameritech states that an update to the estimated traffic allocation factor for Central Office Equipment Category 3 resulted in a shift of switching investment and related expenses to the interstate jurisdiction. *Id.* at 13. Although Ameritech's annual filing estimated the total transitional allocator to be 16.95 percent, its 1988 experience indicates a factor of 19.33 percent, causing the substantial increase in the interstate allocation of Category 3 Switching Investment. *Id.* at 14. Ameritech claims that the $17.7 million rise in the interstate switched access revenue requirement was partially offset by slight reductions in common line and special access, resulting in a net increase of $15.4 million in the total interstate access revenue requirement. *Id.*

C. *Other Adjustments*

1. *Demand.*

10. Ameritech contends that Illinois Bell allocated its interstate revenue requirement to the access and non-access elements as prescribed in Part 69 of the Rules. *Id.* at 21; D&J, Exhibits 2-12, 2-13, and 2-14. It argues that the increase in switched access revenue requirement ($41 million) is halved by the increases in switched access demand. Id. at 21. It further claims that decreases in special access demand will cause a revenue shortfall of $4.9 million, and that the net change overall in switched and special access demand reduces required revenue by $14.1 million. D&J, Exhibit 1-1.

11. Ameritech avers that switched access monthly minute of use (MOU) data (July 1987 through March 1988) reveal that 1988 MOU will be significantly above the filed projections. *Id.* at 22. Accordingly, this filing revises its switched access demand annual forecast upward by 13.7 percent. Ameritech has updated the forecasts for local switching MOU, local transport MOU, equal access trunks and service installations, using the basic process used in the 1988 filing. Ameritech similarly revised special access demand forecasts to reflect actual data for July 1987 through March 1988. *Id.* at 24. *See* D&J, Exhibit 3-2.

2. *Special access rates*

12. Ameritech states that it developed special access rates using the same methodology explained in the annual filing, reflecting shifts in demand and revenue requirements, and adjusting the revenue requirement to account for nonrecurring and miscellaneous revenues. *Id.* at 29. It claims that the proposed rate increase of 11.8 percent for selected services will achieve less than an annualized 12 percent rate of return. According to Ameritech, to achieve the authorized return would require that an 11.8 percent increase be applied to all services in the category, or that an 18.9 percent increase be applied to all services other than digital, high capacity, and video. Instead, its proposed rates moderate these effects, and leave non-market priced services below cost, while rates for the market priced service categories remain above cost, according to Ameritech. *Id.* at 30.

III. PLEADINGS

A. *Ad Hoc*

13. Ad Hoc argues that a mid-course correction is not an appropriate place for Ameritech to claim a revenue requirement increase of $22.5 million associated with new separations studies dealing with circuit equipment, service center activity, and conversation minute miles. Ad Hoc Petition at 3. Ad Hoc also opposes Ameritech's use of a mid-course correction to revise Illinois Bell's COE Category 3 allocation factor,[8] arguing that Section 36.125(c) of the Commission's Rules, 47 C.F.R. § 36.125(c), does not allow Ameritech to substitute an updated allocator in its mid-course correction. Ad Hoc Petition at 5-6.

14. With specific regard to Ameritech's new conversation minute miles study, Ad Hoc asserts that it incorrectly takes into account the rehoming of toll offices and rate restructuring within Illinois that recategorized certain intrastate messages from toll to local. *Id.* at 5-6. Ad Hoc submits that a rate structure action by a state regulatory authority that converts toll service to local service should not lead to significant changes in separations factors. *Id.* at 8.

15. Ad Hoc also argues that the underearning in the special access category alleged by Ameritech is attributable to unexplained increases in "expenses and other taxes" and "average net investment" in the past year cost of service data contained in Exhibit 6 of Ameritech's D&J. Id. at 9. Ad Hoc asserts that absent the dramatic increases in these categories, which are under investigation in CC Docket No. 88-1, Phase II, Illinois Bell's special access category would be earning well in excess of its authorized rate of return. *Id.* Moreover, Ad Hoc contends that Transmittal No. 206 suffers from the same anomalous cost/demand relationships that caused the Bureau to suspend Illinois Bell's special access rates filed in its annual 1988 access tariff filings.[9] *Id.* at 14. It notes that, although the Bureau required Illinois Bell to revise its rates and the rates were allowed to take effect, the cost/demand discrepancies remain under investigation in CC Docket No. 88-1, Phase II. *Id.*[10]

B. *MCI*

16. MCI contends that Ameritech's transmittal attempts to charge interstate access customers for Illinois Bell's poor management of its expenses. MCI Petition at 1-2. It calculates that, on the interstate level, Ameritech proposes increases amounting to 92.45 percent in marketing and 144.45 percent in corporate operations. *Id.* at 3.

17. Concerning Ameritech's assertion of increased demand for access lines, MCI claims that access line growth from Illinois Bell's reported historical period to the first quarter of 1988 shows a demand increase of 2.65 percent. *Id.* at 4. MCI notes that Illinois Bell's budget assumed that access lines would grow at a 2 percent rate, and that the available data indicate that the growth is within this range. *Id.* at 5. MCI also attacks Ameritech's claim of $8 million for the centralized procurement program, and objects to Ameritech's attempt to justify the increase based on only three months of actual data. *Id.* at 5-6.

18. As to the separations changes, MCI protests what it views as an attempt by Ameritech to appease interstate ratepayers by noting that the separations changes will reduce intrastate rates. *Id.* at 9. It asserts that Illinois Bell is in fact not decreasing intrastate rates, but merely refunding excess federal income tax and reduced depreciation expenses in compliance with an order by the Illinois Commission. *Id.*

19. Specifically regarding the circuit equipment study, MCI states that Ameritech does not explain how it decided which records to analyze or what percentage of the total number of records it analyzed. *Id.* Because a majority of circuits are jointly used, MCI declares, the revenue requirement is allocated on the basis of conversation minute miles, in compliance with Part 36, if it cannot be directly assigned. *Id.* at 10-11. It claims that Illinois Bell failed to comply with Part 36 because it allocated this joint investment on the basis of loops and terminations. *Id.* at 11.

20. MCI also asserts that the CMM study is significantly flawed because the restructuring of intrastate toll calls caused an artificial increase in the interstate switched access revenue requirement. *Id.* MCI believes that Ameritech should explain whether the new CMM study reflects rate restructuring in Illinois, and if so, it asks this Commission to direct Ameritech to flow through to the interstate jurisdiction the portion of the $23 million it was allowed to retain to offset any revenue shortfall due to the restructuring of the Chicago area. *Id.* at 11-12.

21. MCI also states that Ameritech has not explained how it obtained the new COE Category 3 factor and has not submitted documents proving that its new allocation factor is correct. *Id.* 12-13. It further asks the Commission to determine whether Ameritech accounted for the investment reserves that would serve to offset the increased interstate investment. *Id.* at 13.

22. MCI protests Ameritech's addition of $2 million in uncollectibles when the record shows that Illinois Bell has not experienced any increase in uncollectible amounts. *Id.* at 13-14. Regarding federal income tax adjustments, MCI observes that Ameritech is proposing to decrease its federal income tax adjustment by $74,477,000 and to increase its federal tax liability. *Id.* at 14. The interstate portion of this increased liability, it contends, exceeds $1.5 million, which amounts to an increase in liability 2,000 percent over the amount claimed in the annual filing. *Id.* at 14.

23. Finally, MCI is perplexed by Ameritech's proposal to decrease its depreciation reserve by more than the reduced total plant in service. *Id.* It notes that, at the interstate level, Ameritech proposes to remove $105,858,061 of plant from service and to decrease its depreciation reserve for this equipment by $202,446,655.[11] *Id.* MCI insists that a relationship of greater than one between the assets being retired and the reduced depreciation reserve is impossible under any accounting standard, and that the Commission should require Illinois Bell to correct this error, which correction will result in a reduction to Illinois Bell's interstate average net investment by over $90 million. *Id.* It concludes that this decrease in interest would reduce the revenue requirement by approximately $12 million which would decrease the rates proposed by Ameritech. *Id.* at 16.

C. *Networks*

24. The Networks do not oppose the proposed tariff revisions because Ameritech proposes to exclude the television service from the 11.8 percent rate increase for special access services, pending resolution of the investigation in CC Docket No. 88-1, Phase II. Network Comments at 1-2. The Networks, however, dispute the television cost and revenue data submitted in the transmittal that purport to show that Illinois Bell is providing television service below its fully distributed costs (FDC), reiterating some of the arguments they make in the investigation of CC Docket No. 88-1, Phase II. *Id.* at 2-4. They urge the Commission to reject the FDC data submitted with Transmittal No. 206 and to examine the issues concerning Ameritech's cost allocation methodologies applied to the television service in the investigation of CC Docket No. 88-1, Phase II. *Id.* at 4-5.

D. *Metropolitan Fiber Systems*

25. MFS believes that there is no justification for Ameritech's proposal to exclude high capacity and digital data special access services from the proposed rate increase.[12] MFS Letter at 2. It disputes Ameritech's assertion that the Illinois market is competitive with respect to these services, claiming that Illinois Bell continues to dominate the high capacity service market. *Id.* MFS asks the Commission to investigate why Illinois Bell is proposing to allocate none of its increased costs to high capacity services and is instead placing all those costs on users of other services. *Id.*

E. *Ameritech Reply*

1. Use of new separations studies

26. Ameritech argues that Ad Hoc's complaint about introducing new separations studies in a mid-course correction is unsupported. Ameritech claims that, in the decision Ad Hoc cites,[13] the Bureau was merely emphasizing the temporary nature of rates proposed in a mid-course correction. *Id.* at 3. Moreover, Ameritech continues, the Bureau approved the inclusion of separations changes in that filing.

27. Ameritech asserts that it could have estimated the study results in its October 1987 filing, but that Illinois Bell elected a more conservative approach that resulted in lower interstate rates for more than half of 1988. *Id.* Delaying the introduction of these studies until the next annual filing is inappropriate, it contends, because the

studies reflect rule changes required by the Commission to be implemented on January 1, 1988, and also contain the best available data on which to base the proposed rates. *Id.* at 4-5. With respect to MCI's claim that Illinois Bell is introducing the new studies to increase its interstate rates before decreasing its intrastate rates, Ameritech notes that on July 1 its intrastate customers began receiving the benefits of these new studies. *Id.* at 5.

2. Specific separations adjustments

a. ***Circuit equipment***

28. Regarding MCI's challenge to the validity of the circuit equipment study that Ameritech included in the separation of "Central Office, Category 4 investment and associated expenses," Ameritech agrees with MCI that it is difficult to determine the jurisdiction of each circuit, and states that instead Illinois Bell allocates the costs to the appropriate jurisdiction using the basic factors determined in the study and the usage factors indicated in Sections 36.126(c)-(f) of the Commission's Rules, 47 C.F.R. § 36.126(c)-(f). *Id.* In addition, Ameritech asserts that it complied with Section 36.126(e)(3), 47 C.F.R. § 36.126(e)(3), when it allocated the costs of circuit equipment, and that it did not use CMM to allocate circuit equipment as alleged by MCI. *Id.* at 9.

29. With respect to MCI's and Ad Hoc's objection to including the effect of Illinois Bell's intrastate rate restructuring in the CMM study, Ameritech argues that the recategorization of certain facilities and messages from toll to local was appropriate and in compliance with the Part 36 rules. *Id.* at 10. It claims that, since the benefits of a reduced intrastate revenue requirement resulting from the CMM study are already being flowed through to Illinois Bell's intrastate customers, it is appropriate to allow the corresponding adjustments to the interstate revenue requirement. *Id.*

b. ***Service center activities***

30. In response to MCI's challenge to Illinois Bell's service center activity cost allocation study, Ameritech states that the study regarding Account 6620 (Customer Services or Local Business Office Expenses) is a sampling of service representatives' daily customer contacts, including timings. *Id.* at 7. Ameritech explains that contacts and timing are recorded by service respresentatives under the scrutiny of trained supervisors and are the basis for ratios of end user service order processing and billing inquiry and interexchange carrier order processing and billing inquiry. *Id.* These ratios, it continues, became the basic study factors that were used in the separations process to allocate monthly customer service expenses to the appropriate jurisdiction. *Id.*

c. ***COE Category 3 Factor***

31. Regarding Ad Hoc's contention that it is improper to correct this factor in a mid-course correction, Ameritech states that the correction is appropriate since Illinois Bell is updating its forecasts for both the composite allocator and the measured DEM factor used in the 1988 annual filing. *Id.* at 5-6. It notes that ignoring the current DEM in reporting its costs would violate Part 36 rules. *Id.* at 6. As to MCI's question of whether Illinois Bell carried the reserves along with the investment shifted as a result of the change in the transitional factor, Ameritech asserts that Illinois Bell has properly accounted for both investment and reserves, increasing plant in service by 2.69 percent and reserves by 2.95 percent. *Id.* at 6-7.

3. Expense levels; management decisions

32. Ameritech argues that Illinois Bell's expense levels are appropriate and that the submissions demonstrate Illinois Bell's management prudence. *Id.* at 11. It notes that the greatest revenue requirement impact in the filing comes from separations changes, not increases in total company expenditures, and that of the $55.2 million increase in the interstate revenue requirements for switched and special access, only $9.9 million results from an increase in total company expenses. *Id.*

33. Regarding Ad Hoc's complaint about the "expenses and other taxes" and the average net investment, Ameritech states that the past year cost of service data for January 1988 reflects budget increases, the effects of Parts 32, 36, and 69 rule changes, the implementation of new separations studies, and the revision of traffic related jurisdictional allocation factors. *Id.* at 15-16. Ameritech contends that Ad Hoc and MCI unfairly focus on accounts that reflect increases while ignoring accounts that reflect decreases, and maintains that the decreases cancel out the increases. *Id.* at 16. Ameritech asserts that a representative comparison between the annual projection and the mid-course forecast would be in the Customer Operations Expense (Marketing and Services) category, which is now forecasted to be $342,334,064, 3 percent higher than the original projection of $331,200,000. *Id.* at 16-17. Moreover, Ameritech iterates, the total expense increase is only $9.9 million. *Id.* at 17.

4. Other arguments

a. ***Voice grade demand***

34. To Ad Hoc's complaint that the special access revenue requirement should not increase if voice grade demand is decreasing, Ameritech responds that voice grade demand decreases were offset by increases in demand for the more costly high capacity service. *Id.* at 17-18. In addition, Ameritech claims that the special access revenue requirement increased because total company costs increased. *Id.* at 18.

b. ***Specific expense items***

35. In response to MCI's challenge to specific expense items, Ameritech states that Illinois Bell is justified in including uncollectibles, federal income tax adjustments, and changes in depreciation reserves in its revenue requirement. *Id.* Ameritech also asserts there is no discrepancy between Illinois Bell's proposed decrease in total plant in service and the decrease in its depreciation reserve, *Id.* at 19-20, and that MCI is incorrect in assuming that the figures must be identical. Ameritech states that its annual forecast amortized its building cable investment over one year (1987), but because neither this Commission nor the Illinois Commission approved the one-year amortization, the current forecast hId. at 20-21. current forecast shows the actual reserve balance for 1987 as $2,726,464,833 instead of $3,082,654,101. *Id.* at 20-21.

36. The projection in Ameritech's annual filing had anticipated higher plant balances for both the end of 1987 and for 1988, which accounts for approximately $60 mil-

lion of the change in depreciation reserve level ($33 million for 1987 and $27 million for 1988), according to Ameritech. *Id.* at 20. It now expects actual depreciation accruals for both years to be lower than anticipated due in part to lower plant in service forecasts and in part to the reclassification of certain assets and their associated depreciation under Part 32 rules, which it claims accounts for approximately $6 million of the reserve difference. Another $23 million is the result of the difference between actual and estimated salvage and cost of removal for both years. *Id.* at 21-22.

37. Regarding the MFS allegations, Ameritech responds that the Chicago "loop" represents 37 percent of Illinois Bell's special access billings, and that approximately 80 percent of the telecommunications usage in the loop "has the potential" to be served by the MFS network. Ameritech Letter at 1. It alleges that MFS seeks to enhance its own market position by asking the Commission to require Illinois Bell to increase prices for its digital services. *Id.* Ameritech observes that other commenters have accused Illinois Bell of exerting market power by pricing digital services too high, and that this underscores the presence of competition in the market as well as the need to permit LECs to include market factors in pricing competitive services. *Id.* at 1-2.

DISCUSSION

38. The Common Carrier Bureau has reviewed the tariff transmittal, the petitions, the Ameritech reply and the Ameritech response to our request for additional information. We find that no compelling argument has been presented that the tariff transmittal is patently unlawful so as to require rejection. We also find that many of the questions raised by the petitioners do not warrant investigation at this time. We do find, however, that an investigation is warranted to determine whether some revenue requirement computations that are based upon revised separations factors are accurate.

39. Although we are not persuaded by claims that revised separations factors cannot or should not be implemented through a midcourse access filing, we have a sufficient doubt about the accuracy of these particular revisions to warrant suspending rate increases that are attributable to those revisions. The data that has been submitted does not enable us to trace the effects of these revisions with great precision, but it appears that about 50 percent of the special access increase and 60 percent of the switched access increase are attributable to these separations changes. *See* D&J, Exhibit 1-1. We are accordingly suspending those portions of the proposed increases for five months pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a).

40. A significant portion of the switched access increases can be traced to the substitution of a COE Category 3 interstate factor of .193534 for the projected factor of .169542 that Illinois Bell used to compute rates in its October 1987 filing.[14] This revision reflects changes in the two components that together constitute the transitional interstate factor -- the composite allocator and the DEM allocator. Ameritech's supplemental response says that while Illinois Bell expected a December 31, 1987 composite allocator of .175346, the operating company has subsequently determined that the December 31, 1987 allocator was .199544.

41. The December 31, 1987 composite allocator will be used to compute the COE Category 3 interstate factor for five years. Therefore, it is particularly important to ensure that this element of the equation used to develop the transitional factor has been computed accurately. The substantial discrepancy between the composite allocator Illinois Bell expected in October 1987 and the composite allocator it used for this filing indicates that further inquiry is warranted. We direct Ameritech to provide a detailed description of the composite allocator computations,[15] as originally developed and as since revised, and to explain why the composite allocator differed so greatly from its expectations.

42. Ameritech has indicated that the $6.5 million increase in interstate C&WF investment is attributable to the use of a revised CMM factor for C&WF Category 3 message trunks. The interstate proportion apparently increased substantially because many trunks that carry mostly intrastate traffic were either reclassified as Category 2 C&WF or replaced with trunks that are included in Category 2, as a result of the restructured local service offering in the Illinois state tariffs. We agree that such a change could increase the interstate portion of C&WF Category 3, but such a change would also presumably increase the intrastate share of the conversation minutes that are used to compute the allocation factor for C&WF Category 2. *See* Section 36.155 of the Commission's Rules, 47 C.F.R. § 36.155. One would expect that an increase in interstate C&WF Category 3 costs would be offset, in whole or in part, by a decrease in interstate C&WF Category 2 costs.

43. Ameritech has not explained why this did not occur. Ameritech's supplemental response does not discuss C&WF Category 2 and does not indicate whether it revised its C&WF Category 2 factors at the same time to reflect the indirect effects of the "major routing changes and recategorization of trunk groups which took place in the first part of 1987." Ameritech's direct case should supply this information and should explain why the increased interstate C&WF Category 3 costs have not been offset by decreased interstate C&WF Category 2 costs.

44. Ameritech has attributed $6.9 million of the $14.2 million increase in special access revenue requirements to a June 1986 circuit equipment study which Illinois Bell implemented in January 1988. *See* D&J, Exhibit 1-1.[16] Ameritech has not described the steps, if any, that it has taken to develop 1988 projected separations factors from the 1986 data.[17] We have previously initiated an investigation of the COE Category 4.23 circuit equipment costs of most major LECs, including Illinois Bell, to determine whether the cost projections are reasonably accurate and are reasonably consistent with demand projections that were used to compute the rates. Although that investigation is still in progress, Ameritech has not explained the steps Illinois Bell has taken to ensure that this filing does not present the same questions. Ameritech should provide such a detailed explanation in its direct case. That explanation should include an explanation of the steps Illinois Bell has taken to reflect anticipated changes in voice grade special access demand in the projection of total cicuit equipment investment, and the apportionment of such investment and related expenses between jurisdictions and among access elements.

45. Accordingly, IT IS ORDERED, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), that the rates filed by Ameritech on behalf of Illinois Bell ARE SUSPENDED until April 3, 1989, five months from the present scheduled effective date.

46. IT IS FURTHER ORDERED, pursuant to Sections 204(a), 205, 208 and 209 of the Communications Act, 47 U.S.C. §§ 204(a), 205, 208, and 209, that AN INVESTIGATION of the captioned tariff revisions IS INSTITUTED. Ameritech is directed to file its direct case, including the information specified herein and any additional or revised information specified in any subsequent Order, no later than December 5, 1988. Oppositions to Ameritech's direct case shall be filed no later than 14 days after it is submitted, and replies no later than 14 days after oppositions are filed.

47. IT IS FURTHER ORDERED that Ameritech shall issue a supplement no later than November 10, 1988 indicating that the proposed access rates ARE SUSPENDED to the extent indicated herein.

48. IT IS FURTHER ORDERED that Special Permission No. 88-517 is assigned for the purpose of issuing the above supplement.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Ameritech's revenue requirement is increased by $54.1 million. The difference reflects that actual revenues for switched access service, based on current rates, will substantially exceed original projections.

[2] Ad Hoc Petition to Reject or Suspend, filed Aug. 22, 1988 (Ad Hoc Petition); MCI Petition to Reject or, in the Alternative, Suspend and Investigate, filed Aug. 22, 1988 (MCI Petition); Letter from Swidler & Berlin to Secretary, Federal Communications Commission, dated Sept. 8, 1988 (MFS Letter). Comments of Capital Cities/ABC, CBS, and NBC, filed Aug. 22, 1988 (Network Comments).

[3] Letter from John C. Litchfield, Ameritech, to Chief, Tariff Division, dated Sept. 22, 1988 (Ameritech Letter).

[4] Under Section 36.126(a) of the Commission's Rules, 47 C.F.R. § 36.126(a), this category encompasses radio systems and circuit equipment contained in class A accounts 2231 and 2232. Central Office Equipment Category 4 comprises all central office equipment other than switching equipment. Examples of circuit equipment include, *inter alia*, carrier telephone and telegraph system terminals, telephone repeaters, and radio transmitters.

[5] Ameritech emphasizes that the latest study was developed using June 1986 data which reflected a $241 million investment increase over the last circuit equipment study which was based on a December 1984 study month. *Id.* at 9. The study also reportedly incorporated changes that shifted investments among separations categories, such as the Commission's requirement to move WATS from message to private line. *Id.*

[6] These costs are defined as Local Business Office expenses under Section 36.377(a) of the Commission's Rules, 47 C.F.R. § 36.377(a).

[7] Ameritech explains that conversation minute miles are obtained by multiplying conversation minutes on a toll trunk group by the average circuit route miles on that trunk group. *Id.*

[8] The adjustments to the COE Category 3 allocation factor result in a $15.4 million increase in Illinois Bell's interstate access revenue requirement. D&J at 7.

[9] Annual 1988 Access Tariff Filings, Memorandum Opinion and Order, 3 FCC Rcd 1281, 1298 (1987).

[10] Annual 1988 Access Tariff Filings, Designation Order, CC Docket No. 88-1, Phase II, 3 FCC Rcd 2043, 2043-44 (1988).

[11] MCI states that Ameritech proposes to decrease its total plant in service by $711,827,046 and at the same time decrease its depreciation reserve for this plant by $857,419,596. *Id.*

[12] MFS provides high capacity private line digital access services to interexchange carriers and end users in the Chicago area.

[13] New York Telephone, Memorandum Opinion and Order, Mimeo No. 6324, released Aug. 12, 1986, at 4-5.

[14] Ameritech's supplemental response, Exhibit F, distinguishes between the "DEM factor" and one of its components, the "DEM allocator." For clarity we use the terms "transitional factor" or COE Category 3 factor to describe the final allocative factor, derived from a composite allocator and DEM allocator, that accounts for $17.7 million of the $25.4 million in separations-based changes to the revenue requirement for the switched access category.

[15] That description should tell us when the computations were performed, and when and how the results were implemented in rates, earnings reports, etc.

[16] The effect of the revised circuit equipment study was to increase interstate costs by $9.6 million. This increase was divided as follows: common line increased $5.6 million, switched access decreased $2.8 million, and special access increased $6.9 million.

[17] Adjustments were made to this study to reflect the requirements of new Part 32 and 36 of the Commission's Rules, high capacity investment assignments, digital data investment reclassification and updated termination count procedures. Ameritech did not discuss the effects of those adjustments. *See* D&J, 9-10.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-410

In the Matter of

Amendment of Section 73.202(b),	RM-5802
Table of Allotments,	RM-6206
FM Broadcast Stations.	RM-6207
(Waterbury and Royalton, Vermont)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 31, 1989; Released: June 20, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of Harvest Broadcasting, Inc. (petitioner), licensee of Station WGLY-FM, Channel 276A, Waterbury, Vermont, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 6102 (1987), proposing to substitute Channel 276C2 for Channel 276A at Waterbury. The *Notice* further proposed to modify the license of Station WGLY-FM to specify operation on the higher class channel, as that community's first wide coverage area FM service. In response to the *Notice*, the petitioner and AGK Communications, Inc. ("AGK"), filed counterproposals for, respectively, the allotment of Channel 277C2 as a substitute for Channel 276A at Waterbury in lieu of the original proposal and the allotment of Channel 277A to Royalton, Vermont.[2] Brian Dodge, pro se, filed an unacceptable counterproposal for the allotment of Channel 277A to Wilder, Vermont.[3] Metro-Net/Vermont, Inc. ("Metro-Net"), filed comments. Petitioner and Metro-Net filed reply comments.[4] Herbert O. Carpenter, Jr. ("Carpenter"), an applicant for Channel 278A at Plattsburgh, New York, filed an opposition to the petitioner's counterproposal. In addition, late-filed comments were submitted by E.F.E.M. Group.[5]

2. In its counterproposal, petitioner sets forth three optional proposals aimed at accomplishing a Class C2 upgrade at Waterbury. First, in order to permit the substitution of Channel 276C2 for Channel 276A at Waterbury, it suggests channel changes in Canadian allotments at Huntingdon, Quebec, and Cornwall, Ontario. Second, petitioner proposes to operate Channnel 276C2 at either reduced power or with a directional antenna to protect Canadian allotments. Third, petitioner suggests the substitution of Channel 277C2 for Channel 276A at Waterbury and the substitution of Channel 286A for Channel 278A (vacant but applied for) at Plattsburgh, New York.[6]

3. In reply comments, petitioner suggests that rather than allotting Channel 277A to Royalton, as requested by AGK, that Channel 259A be allotted to that community. Petitioner claims that consideration of Channel 259A at Royalton was previously precluded by Channel 260C at Plattsburgh, New York. It states that as result of the recent downgrading of the Plattsburgh station to a Class C2 facility, Channel 259A is now available at Royalton.

4. Metro-Net opposes the proposed allotment of Channel 276C2 at Waterbury. It contends that the proposal violates the Commission's separation requirements because of a short spacing to Channel 276A at Joliette, Quebec, Canada. Metro-Net urges the denial of the proposal on the basis of the short spacing to the Joliette channel. In reply comments, Metro-Net asserts that with respect to the proposal, Channel 276A at Huntingdon, Quebec, Canada, creates a far more serious short spacing than the Joliette allotment. It argues that the proposal and counterproposals filed by the petitioner and Brian Dodge are technically defective and, therefore, should be denied. Metro-Net states its support for the allotment of Channel 277A to Royalton.

5. Carpenter objects to the substitution of Channel 286A for Channel 278A at Plattsburgh, a change necessary in order to accomplish the substitution of Channel 277C2 at Waterbury. Carpenter contends that Channel 286A at Plattsburgh fails to comply with the Commission's spacing requirements from the proposed site specified in his application because of a 4.6 kilometer short spacing to Canadian Station CFGL, Laval, Quebec. He, therefore, urges the denial of the proposal to allot Channel 277C2 at Waterbury.

6. We have confirmed that Channel 259A is available at Royalton, Vermont, thus removing the conflict with the Waterbury proposal. The channel can be allotted to Royalton in compliance with the Commission's minimum distance separation requirements.[7]

7. As stated in the *Notice*, because of the short spacings to Canadian proposals for Channel 276A at Joliette and Huntingdon, Quebec, we permission from Canada for Channel 276C2 at Waterbury to operate as a specially negotiated short spaced allotment. The Canadian government rejected the proposal.

8. We have determined that of the three optional counterproposals submitted by the petitioner the only grantable proposal is the proposed substitution of Channel 277C2 for Channel 276A at Waterbury. Channel 277C2 can be allotted to Waterbury in compliance with the Commission's minimum distance separation requirements with a site restriction, if a channel substitution is made at Plattsburgh, New York (Channel 286A for Channel 278A). Since Channel 278A at Plattsburgh is a Docket 84-231 allotment, petitioner was required to demonstrate that the alternative channel could be substituted at the sites specified in the four applications on file in compliance with the spacing requirements. *See* fnt 4 *supra*. Petitioner failed to provide the necessary engineering showing to support its proposal.

9. However, the Commission subsequently learned that there were technical difficulties caused by the Huntingdon, Quebec, channel which prohibited the operation of the petitioner's current station, on Channel 276A, at Waterbury. Therefore, we undertook the necessary engineering analysis to determine if Channel 286A could be substituted for Channel 278A at Plattsburgh at the sites specified in the four pending applications. Our engineering analysis reveals that Channel 286A can be substituted for Channel 278A at Plattsburgh using the sites specified in the applications consistent with the Commission's minimum distance separation requirements. Although Channel 286A at Plattsburgh is short-spaced to Canadian

Station CFGL, Laval, Quebec, concurrence has been obtained from the Canadian government to permit operation of the channel as a specially negotiated short spaced allotment. Thus, Channel 277C2 can be substituted for Channel 276A at Waterbury.

10. With the substitution of Channel 286A for Channel 278A at Plattsburgh, Channel 277C2 at Waterbury requires a site restriction of 8.8 kilometers (5.5 miles) southeast of the city (at coordinates 44-17-14 and 72-40-14) in order to avoid a short spacing to Channel 276A at Huntingdon, Quebec, Canada. Petitioner specified a desire to utilize a site 11.4 kilometers (7.1 miles) east of the Waterbury.[8]

11. As requested, we are modifying the license of Station WGLY-FM, Waterbury, Vermont, to specify operation on Channel 277C2 in lieu of Channel 276A in accordance with Section 1.420(g) of the Commission's Rules.

12. Since the communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence from the Canadian government has been obtained.

13. We shall serve the applicants for Channel 278A at Plattsburgh with a copy of this *Order*. The applicants will be permitted to amend their applications for Channel 278A at Plattsburgh to specify Channel 286A without loss of "cut-off" status since no upgrade in class of channel will result. *See Salamanca, New York and Bradford, Pennsylvania*, 50 FR 26208, June 25, 1985, and *Sanibel, Florida*, 50 FR 32706, August 14, 1985.

14. Based on the information before us, we believe the public interest would be served by the substitution of Channel 277C2 for Channel 276A at Waterbury, Vermont, as that community's first wide coverage area FM station. We also find that the public interest would be served by the allotment of Channel 259A to Royalton, Vermont, as that community's first local FM service.

15. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 3, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

City	Channel No.
Plattsburgh, New York	260C2, 286A
Royalton, Vermont	259A
Waterbury, Vermont	277C2

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Harvest Broadcasting, Inc., Station WGLY-FM, Channel 276A, Waterbury, Vermont, IS MODIFIED, to specify operation on Channel 277C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

17. The window period for filing applications on Channel 259A at Royalton, Vermont, will open on **August 4, 1989,** and close on **September 5, 1989.**

18. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicants for Channel 278A at Plattsburgh, New York, as follows: John T. Ryan, Rt. 1, Box 100A, Peru, NY 12972; John J. Long, Jr., 9 Rayton Road, Hanover, NH 03755; Walter J. Jakubowski, Camp Topridge, Paul Smiths, NY 12970; and Herbert O. Carpenter, Jr., 63 Bridge Street, Plattsburgh, NY 12901.

19. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

20. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Royalton, Vermont, has been added to the caption.

[2] Public Notice of the acceptable counterproposals was given January 8, 1988, Report No. 1705.

[3] Brian Dodge failed to provide a technical showing demonstrating the Wilder proposal complied with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. He also failed to state his intention to apply for the channel. Therefore, the proposal is defective and unacceptable for consideration.

[4] Petitioner also filed a "Petition to Deny" the Royalton counterproposal approximately three months after the expiration date for responding thereto. In accordance with Section 1.415(d) of the Commission's Rules we shall not accept the additional pleading.

[5] In accordance with Section 1.415(d) of the Commission's Rules, we have not accepted the late-filed comments of E.F.E.M. Group for consideration.

[6] Channel 278A at Plattsburg was allotted in the *First Report and Order* in MM Docket No. 84-231, 50 FR 3514, January 25, 1985, and four applications were pending for the allotment. Petitioner was required to demonstrate that the channel sub-

stitution at Plattsburg meets the spacing requirements for the sites specified in the applications on file as of the date its petition was submitted.

[7] The reference coordinates are 43-48-57 and 72-32-46. Channel 259A at Royalton appears to be short-spaced to a Class C the construction permit for Station WGFB(FM), Channel 260 at Plattsburgh, New York. However, that short spacing is irrelevant since Station WGFB(FM) is presently operating with Class C2 facilities, and has a construction permit, which, although nominally for Class C facilities, is limited by agreement with the Canadian government to Class C1 facilities of 100 kW at 152 meters HAAT. Because a full Class C facility on Channel 260 at Plattsburgh is not acceptable to the Canadian government, we will protect WGFB as a Class C1 facility. Using Class C1 facilities, WGFB is fully spaced to channel 259A at Royalton.

[8] The restricted site coordinates are 44-18-14 and 72-37-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Local Exchange Carrier
Access Tariff Rate Levels

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 1989; Released: June 29, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Report and Order in CC Docket No. 88-326 modified the effective date of the local exchange carriers' (LECs) Annual 1989 Access Tariff Filings from January 1, 1989, to April 1, 1989.[1] Pursuant to that Order, and specific filing and cost support instructions set forth by this Bureau in two later Orders,[2] the subject LECs filed annual access tariffs prior to December 30, 1988. The review of the LECs' annual access tariff filings was completed by Bureau Order released March 22, 1989.[3] We determined that the rates filed by many of the LECs would be likely to produce returns in excess of the allowed rate of return, and therefore allowed only part of those LECs' proposed rates to become effective pursuant to Section 204(b) of the Communications Act, 47 U.S.C. § 204(b). That action resulted in a further rate reduction of approximately $705 million[4] to the reductions proposed by the LECs, resulting in a total reduction of approximately $1.194 billion.

2. The *1989 Access Order* noted:

> We wish to emphasize that neither these partial rate allowances nor the RAFs used to implement them are rate prescriptions pursuant to Section 205(a) of the Communications Act, 47 U.S.C. § 205(a). They represent, rather, partial authorizations of rates to the extent necessary to correct apparently erroneous aspects of the rate development process as set out in the LEC tariff filings and subsequent material of record. The LECs are free to file revisions to the resultant rates at any time. Of course, such filings must be accompanied by relevant cost support information and we would expect the [sic] a LEC that files rate increases to address fully the considerations which led us to conclude that the rates filed in these transmittals should be subject to Section 204(b) partial authorization.

1989 Access Order, 4 FCC Rcd at 3707. Seven LECs have filed various transmittals to increase access rates. The LEC justifications for those increases challenge various Bureau findings in the *1989 Access Order*.[5]

3. As an initial matter for purposes of our review and analysis, the issues raised by the LECs are grouped into five broad categories, representing the five types of challenges presented by the LECs. These challenges are categorized as presentations of (1) data correcting erroneous data presented by the LECs in their access tariff and errata filings; (2) new data filed as a substitute for or enhancement of data originally filed by the LECs, which basically represent piecemeal challenges to the findings of the *1989 Access Order;* (3) arguments challenging the methodology used, or suggesting improvements to the methodology used, by the Bureau; (4) arguments asserting that the Bureau made errors in our analysis or calculations; and (5) data relating to inside wiring expenses.

II. GENERAL DISCUSSION OF ISSUES

A. *Categories of Issues Raised by LECs*

4. As we have noted, the issues raised by the LECs in the various transmittals can be classified into five categories. These classifications relate generally to the underlying basis for each of the LECs' requests, and specifically to the type of allegation or showing made by the LEC.

1. *Corrections of Erroneous Data Originally Submitted*

5. The first category of issues raised by the LECs involves proposed increases in rates based upon the correction of data originally submitted by each of the LECs in the tariff review plan (TRP), database, or errata filings prior to the April 1 effective date of the rates.

6. In two separate Orders released by the Bureau prior to the LECs' filings, we clearly identified the filing requirements for the LECs, including a specific identification of data to be filed. In the *Cost Support Order*, the Bureau required the filing of specific and detailed information by the LECs on or before December 30, 1988, stating specifically that detail and uniformity of information were important.[6] That Order noted that "the submission of incorrect cost suport [sic] data and the subsequent filing of errata seriously detract from the ability of the Commission and interested parties to evaluate the reasonableness of proposed rates within the notice period"[7] and required the National Exchange Carrier Association, Inc. (NECA) and the LECs to "certify the accuracy of historical and test year data that are submitted in support of proposed rates."[8]

7. The requirements of accurate and certified data are unequivocal and similar to previous requirements.[9] It is also clear that the LECs were given adequate notice, both from the *Cost Support Order* and requirements imposed in previous years, that failure of the LECs to supply accurate data could have adverse consequences. In addition, this Bureau allowed the LECs, with good cause, to file errata prior to the effective date of the tariffs.[10]

8. The data corrections some LECs have submitted to justify some of the rate increases in the pending filings reveal particularly egregious violations of the above requirements. Certain LECs admit to the omission of data from the cost of service (COS) database, while others admit to the provision of "dummy" numbers in the TRP.[11] Given that the Bureau provided adequate notice of the information required, much of which is required to be kept by the LECs under various provisions of the Commission's Rules, and provided opportunity for correction of erroneous data on a timely basis, we conclude that we should not accept rate increases based upon "cor-

rected" data at this late date in the absence of a clear demonstration that all errors have been corrected that could affect any access rate. The LECs that rely upon "corrected" data have merely provided corrections that benefit the LEC. In the absence of the ability to judge if other errors were made that would not be to the benefit of the LEC, these proposed adjustments are not permitted.

2. Piecemeal New Data Submitted in Place of Original Data

9. The second category of issues raised by the LECs involves rate increases based upon the submission of new data in place of that originally submitted by each of the LECs in the TRP, database, or errata filings. The additional data is not sufficiently comprehensive to enable us to determine whether other new information has become available which would offset the effects of the new or additional data that the LECs have provided. Reliance upon such incomplete data does not provide an adequate cost justification for increased rates in the present circumstances.

3. Challenges to Bureau Methodology

10. The third category of issues raised by the LECs involves rate increases based upon challenges to the methodology used by the Bureau for determining the level of partial allowances, or based upon suggested improvements to the methodology used, which are then applied to an aspect of that particular LEC's filing.

11. We have analyzed each LEC suggestion to determine whether it represents alternatives or suggested improvements in the Bureau's methodology, or whether the LEC has identified errors in the analysis or calculations of the Bureau. The former suggestions are included in this category, and are addressed further in Section II.B, *infra*, where we discuss our reasons for rejecting the LECs' proposed changes to our methodology; the latter are discussed in Section II.A.4, *infra*.

4. Errors in Analysis or Calculations Performed by the Bureau

12. The fourth category of issues raised by the LECs relates to requests for increases in rates based upon alleged errors of analysis or calculation by the Bureau. The merits of each proposed adjustment in this category are discussed in Section III, *infra*.

5. Inside Wiring Disallowances

13. The fifth category of issues raised by the LECs relate to the inside wiring disallowances. The merits of each proposed adjustment in this category are discussed in Section III, *infra*.

B. Trend and Cross-Section Methods Used by Bureau

14. Despite criticisms of various aspects of the statistical methods employed by the Bureau, we remain convinced that the statistical methods are appropriate and correctly implemented.

1. Use of Industry Average Growth Rates

15. Contrary to the claims of certain LECs, the cross-section analysis used by the Bureau in the *1989 Access Order* did not compare the growth rates of individual companies' forecasts with an industry average growth rate to determine whether the forecasts were unreasonable. For each cost category, individual companies' growth rates were judged potentially unreasonable if they exceeded a benchmark growth rate which was significantly greater than the industry average. The benchmark varied for each cost category and was based on the average industry growth rate and the dispersion of companies' forecasts around the industry average (the standard deviation), for the cost category in question. For instance, the industry average forecast growth rate for corporate operations (executive and planning) expense was 2.66 percent but there was substantial fluctuation of growth rates around the average, measured by the standard deviation at 27.70 percent. Hence the benchmark adopted by the Bureau to identify excessive forecasts was a growth rate of 30.36 percent, the sum of the industry average and standard deviation.

16. As this example demonstrates, the industry average was just one factor in determining the benchmark and not necessarily the most important one. In all cases, the benchmark was established above and, as the example demonstrates, sometimes substantially above, the industry average. The difference between the mean and the benchmark, which equals the standard deviation, should be sufficient to account for any differences in the market, operating conditions, or other economic factors facing individual companies. Thus the argument that the Bureau has neglected to take individual companies' different conditions into account is false.

17. From a practical perspective, the benchmarks established by the method described above were very high and thus permitted companies considerable flexibility in forecasting. In the example above, forecast growth of as much as 30 percent would not have been identified as excessive. The benchmarks for the 22 cost categories varied between 9.21 percent (exchange line plant) and 41.48 percent (exchange trunk plant). Thus, strong forecast growth was permitted in each cost category.

18. Forecasts identified as excessive by the method described above were screened by an additional statistical test, before becoming potentially subject to disallowance. The actual unit costs of all Tier 1 companies were compared for each cost category. For a particular company, if the unit cost did not exceed the mean plus standard deviation for the Tier 1 companies as a whole, the company's forecast was not challenged, no matter how high the associated growth rate. Thus, if a company had a unit cost for corporate expense that did not greatly exceed the average, a forecast in excess of 31 percent would not have been identified as potentially unreasonable.

19. Finally, our actions were not based on statistical tests alone. Statistical tests were used to identify potentially unreasonable forecasts. All potentially unreasonable forecasts were then individually examined, in relation to cost support and information supplied in the replies, before a determination was made. This determination thus was based on the Bureau's assessment of the overall adequacy of each LEC's cost support and related showings. We therefore do not believe that the method used in the

1989 Access Order treats the LECs unfairly. Only forecasts which are clearly shown to be above any reasonable bounds are identified as subject to partial disallowance.

2. *Level of Aggregation*

20. In addition, certain LECs criticize the Bureau's cross-section analysis as too disaggregate, both with respect to geography and level of cost aggregation. Some LECs argue that the analysis should have consolidated study areas to a regional level, especially for those LECs that filed regional tariffs. Some LECs also argue that the analysis should have aggregated, in some unspecified manner, the 22 major budget items. In a similar argument, several LECs alternatively state that in disallowing revenue requirements based upon forecasts which appeared to be excessive, this Bureau erred in not offsetting disallowances by upward adjustments of forecasts which appeared insufficient because the forecast fell below some unspecified benchmark.

21. We applied the cross-section analysis (1) on a study area basis; and (2) for 22 major budget items to all LECs, regardless of the level on which they filed tariffs, for several reasons. In general, an analysis based on these conventions reflects the fact that LECs are required to forecast and report actual operating statistics on a study area basis for hundreds of accounts and separations categories. Hence, our analysis is based on the application of the cost allocation procedures that the Commission's Rules require companies to follow (*e.g.*, Parts 32, 36, 69) for reporting actual operating statistics, and the fact that the *Cost Support Order* and *Waiver Order* require proposed test year budget forecasts be filed in the annual access tariff proceeding.

(a) *Study Area Aggregation*

22. Even if LECs choose to file tariffs at a regional level, the cost data must be amenable to evaluation on a state specific basis. The Bureau must be able to ascertain during review that the interstate portion of the costs has been separated in accordance with Part 36 of the Rules, which requires allocation on a study area basis. Costs which are not forecast on a study area level of detail cannot be so evaluated. Each study area has different interstate separation factors applicable to the same cost item, so it is important that each cost item be correct on a state basis, rather than merely on a regional basis. Furthermore, statements by the LECs that budgeting is performed on a regional basis and should only be subject to regional review are unconvincing because of the fact that each state public utility is obligated to evaluate the revenue requirement for the particular state in which it operates. Therefore, costs should be supportable on a state-by-state basis.

23. Further, even if the cross-section analysis had been applied on a regional basis, it is unclear whether there would be substantial decreases in the amount of forecasts identified as potentially unreasonable, as some LECs have suggested. To the extent peaks and valleys of study area budget views were averaged as regional forecasts, the variance of the forecasts would decrease and the benchmark used to identify potentially excessive forecasts, which is based on the variance, would be reduced.

(b) *Budget Item Aggregation*

24. The Bureau selected 22 budget items, representing a disaggregation of operating expenses and plant. Although certain LECs claim that the 22 budget items represent an inappropriately high level of disaggregation of the budget projections, the 22 budget items represent major budget categories, such as subscriber line, local switching equipment, and marketing expense. These 22 budget items are, in fact, aggregations of more highly disaggregated budget items required by Parts 32 and 36 of the Rules and the *Cost Support Order*. The Rules require that companies book and separate costs at a level of detail consisting of hundreds of cost items. For various reasons, however, it was impractical to apply the cross-section analysis to fully disaggregated cost items. Instead, for the purpose of reviewing the 1989 annual access tariff filings, we selected 22 budget items, which in most cases represented aggregations of fully disaggregated cost items.[12]

25. The cross-section analysis of the 22 budget items enables this Bureau to determine whether a company's forecast of major budget items appears to be reasonable,[13] and supplements the finding of the time series analysis which evaluates budget forecasts on a overall basis only. A LEC, for instance, may project overall a budget that appears unremarkable, but which on closer examination contains many unreasonable estimates for specific budget items. For example, Nevada Bell's projection of overall operating expenses was within reasonable bounds (Nevada Bell projected 7.23 percent growth versus a benchmark of 7.35 percent growth), but projections of individual cost items appeared excessive when compared to benchmarks for those items (Nevada Bell projected 33.49 percent growth in general support expenses versus a benchmark of 15.70 percent). The statistical tests we used have been fashioned to help ensure that the LECs' projections are sound as both major budget items as well as an overall basis.

III. ANALYSIS AND DISCUSSION

A. *Inside Wiring*

1. *Background*

26. In the *1989 Access Order*, we disallowed approximately $158.7 million of the interstate revenue requirements the Bell Operating Companies (BOCs) and GTOC (California) had forecast for regulated wiring. The disallowances reflected a determination that for purposes of that Order no more than 32 percent of Account 6362, other terminal equipment expense, should be considered regulated for any study area. The 32 percent factor was used as "the best available estimate of the proper allocation of inside wiring expenses to regulated activities."[14] It was derived from BellSouth's forecast, which indicated that 40 percent of that company's wiring expenses would be regulated. We reduced that percentage to 32 percent as "a reasonable, conservative estimate" of the adjustments warranted to correct certain systematic deficiencies in BellSouth's internal accounting procedures.[15] We applied this 32 percent factor to the total wiring expense the BOCs and GTOC (California) had forecast for each of their study areas to determine the portion of that expense that should be classified as regulated.

27. In applying the 32 percent factor, we recognized that alternative methods of determining regulated wiring expenses might achieve more accurate results. We were unable to employ those methods, however, because the regulated wiring forecasts made by the BOCs and GTE (California) were based on internal accounting systems that systematically overstate regulated wiring costs and because the LECs were unable to provide reliable data regarding field technician activities.[16] This lack of data made it impossible to determine, through any method other than a benchmark comparison, the impact of the defects in the carriers' internal accounting systems as well as any defects in the implementation of those systems.[17] We stated, however, that "[t]he LECs remain free to present improved, more credible demonstrations of proper inside wire allocations."[18] In their tariff revisions, Ameritech, NYNEX, and US West attempt such demonstrations.

2. ***Ameritech***

28. In Transmittal 316, Ameritech challenges the 32 percent regulated to total expense ratio for inside wiring we used in the *1989 Access Order*. Ameritech submits a study of expenses it claims are properly attributable to regulated inside wiring, Account 6362, subaccounts and concludes that its regulated to total expense ratio for inside wiring should be 49.9 percent. Accordingly, Ameritech asserts that the 49.9 percent regulated expense ratio results in a $54.6 million increase in total company expenses and a $12.7 million increase in interstate revenue requirements. Ameritech Tr. 316, Description and Justification (D&J) at 25.

29. AT&T asserts that Ameritech assigned all costs of maintenance visits which resulted in no access (NA) to customer premises or no trouble found (NTF) in the inside wiring network 100 percent to the regulated jurisdiction, contrary to the *1989 Access Order* which states that such inside wiring maintenance visits must be apportioned between regulated and nonregulated costs. AT&T Petition, Ameritech Tr. 316 at 3. AT&T argues that while Ameritech now apportions NA and NTF visits as required by the Order, its percentage of NA and NTF maintenance visit hours, as well as the reported time spent per visit, has decreased sharply for no apparent reason and without explanation from Ameritech. *Id.* at 4-5. Thus, AT&T maintains that dramatic swings in Ameritech's reporting of NA and NTF maintenance visits raise a substantial issue as to whether costs associated with maintenance of nonregulated inside wire are properly allocated to the nonregulated jurisdiction. *Id.* at 6.

30. MCI challenges Ameritech's apportionment of inside wiring expenses, claiming that a review of Ameritech's data indicates that certain information is missing which prevents the Commission from determining whether Ameritech's breakdown of hours charged to Account 6362 by time reporting codes is reasonable. MCI Petition, Ameritech Tr. 316 at 11.

31. Ameritech contends that AT&T's allegations regarding its allocation of inside wiring expenses are based solely upon comparisons of 1987, 1988, and 1989 data for NA and NTF average maintenance time per visit and the percentage of NA and NTF hours to total maintenance hours. Ameritech Reply, Ameritech Tr. 316 at 13. Ameritech asserts that the comparisons are inaccurate and do not provide any relevant evidence. *Id.* Ameritech argues that MCI does not explain why the information it suggests would be helpful is needed prior to the Commission's evaluation of Ameritech's proposed inside wiring apportionment, and notes that MCI does not make specific objections to the apportionment methodology or the related data presented in Transmittal 316. *Id.* at 15.

32. Under the *1989 Access Order*, Ameritech's interstate revenue requirement allowance for Account 6362 is $26.9 million below the level claimed in Ameritech's 1989 access tariff filing. In Transmittals 316 and 323, Ameritech claims an increase of approximately $11.1 million in that allowance.[19] If that amount is allowed Ameritech says that no more than 47.8 percent of Ameritech's wiring expenses will be classified as regulated expense. In its 1989 access tariff filing, Ameritech had indicated that 68.7 percent of those expenses would be regulated expense.

33. The 47.8 percent figure on which Ameritech relies is derived from its operating companies' time reporting results for January through March 1989. During that period, Ameritech's field technicians classified as regulated approximately 57.6 percent of the work time that they reported for activities recorded in Account 6362. That percentage reflects the defects in Ameritech's time reporting practices that we discussed in the *1989 Access Order* regarding the treatment of no access, no trouble found, travel, and testing time.[20] It also reflects any defects there may have been in the implementation of the five separate time reporting systems maintained by Ameritech's five operating companies.

34. Ameritech proposes a series of adjustments to compensate for these defects. Collectively, the adjustments represent approximately 9.8 percent of the expenses Ameritech forecast for Account 6362. Ameritech argues that we should accept these adjustments because its operating companies do not separately track the travel and repair time associated with the instances in which its time reporting practices are improper.

35. We believe that the method Ameritech proposes is reasonable under the circumstances, and we therefore increase its interstate revenue requirement for Account 6362 by $11.1 million. The interstate revenue requirement that Ameritech's 1989 access tariff forecast for that account was based on 1988 time reporting results. Because Ameritech's operating companies employed time reporting systems during that period that are inconsistent with Commission requirements, Ameritech must adjust its forecasts to reflect those deficiencies. We believe that the method Ameritech proposes -- adjustments totaling approximately 9.8 percent to time reporting results for the first three months of 1989 -- produces an interstate revenue requirement for Account 6362 that approximates closely the results that proper time reporting practices would have produced.

3. ***NET and NYT Transmittals***

a. ***Introduction***

36. In their 1989 access filings, NET and NYT respectively stated that 93.1 percent and 83.0 percent of their wiring expenses recorded in Account 6362 would be regulated. Since those percentages exceeded our 32 percent factor by a wide margin, we reduced NET's and NYT's revenue requirement allowances for Account 6362 substantially below those levels. The reductions totaled $19.6 million for NET and $41.1 million for NYT.

b. *NET Transmittal 990*

37. In this transmittal, NET claims an additional revenue requirement of $5.0 million for Account 6362. NET states that its 1989 access tariff filing erred in stating that 93.1 percent of NET's wiring expense would be regulated. NET asserts that it had actually forecast that 77.6 percent of that expense would be regulated and that its tariff review plan (TRP) misallocated a large portion of this expense to other accounts. According to NET, this misallocation occurred because it forecast its plant specific expenses at the summary account level. NET states that it distributed the forecast amounts among the individual accounts in proportion to historical ratios of individual account totals to the summary account total. This method, NET argues, failed to recognize that Account 6362 has historically been composed of approximately 80 percent of the nonregulated portion of the summary account total, but only 24 percent of the regulated portion of that total. NET states that this error caused it to underestimate its interstate revenue requirements in other accounts by $5.0 million. NET proposes to correct this error by increasing its interstate revenue requirement allowance for Account 6362 by that amount. NET Tr. 990, D&J at 6.

38. MCI disputes NET's claim (at Tr. 990, D&J at 4) that its Account 6362 costs have historically contained 80.5 percent of its total nonregulated plant specific costs since that figure is based on data from only one month in 1988. According to MCI, during the first nine months of 1988 only 25.1 percent of NET's nonregulated total plant specific expenses were in Account 6362. MCI asserts that NET actually allocated approximately the same proportion of its nonregulated expenses to inside wiring for 1989 as it allocated in 1988. MCI Petition, NET Tr. 990 at 3. Moreover, MCI contends that NET had two opportunities to present corrective data and explain or modify its forecast but failed to do so. To allow NET to do so now, MCI argues, would severely compromise the access review process by establishing the precedent of allowing LECs to continually file explanations for their faulty cost support data and forecasts. *Id.* at 4.

39. AT&T argues that NET's prior year's cost of service (PYCOS) data for the first nine months of 1988 for regulated inside wiring costs are inconsistent with its proposed inside wiring corrections, thus raising serious questions as to the accuracy of those corrections. AT&T submits that even if the inside wiring corrections were accurate, adjustments to regulated and nonregulated Account 6362 costs would require a comprehensive new analysis of all the accounts affected by the adjustments since a decrease in Account 6362 regulated costs cause a corresponding increase in several other plant specific operations expense accounts. AT&T Petition, NET Tr. 990 at 6-7.

40. In a reply filed jointly by NET and NYT, NET asserts that its joint cost report was accurate, but Chart COS-7(H) was not accurate at the Class A account level. NET states that when it corrected its Chart COS-7(P) in its May 3 filing, it should have also corrected its Chart COS-7(H) to incorporate the actual results of its 1988 cost allocation manual (CAM) data. Those data show that NET associated 79.9 percent of its Account 6362 expenses for 1988 with regulated activities. NET/NYT Reply, Tr. 990 at 5. NET also contends that correction of Chart COS-7(H) is consistent with NET's revised Chart COS-7(P), which forecasts that 77.6 percent of NET's inside wiring expenses will be regulated in 1989. NET avers that when it prepared its 1989 access tariff filing it did not have final Part 64 data because changes in its CAM were implemented during the third quarter of 1988. Therefore, says NET, it relied on its monthly separations data, which did not reflect CAM changes, to develop its TRP charts. *Id.* at 6. NET asserts it has maintained the same level of total regulated plant specific expenses, and that its revisions of Charts COS-7(P) and COS-7(H) do not increase its projected revenue requirements. Thus, NET argues, there is no need for the Commission to revisit its budget analysis simply because NET reallocated its nonregulated expense forecast. NET submits that all data relevant to its tariff, including data revisions relating to inside wiring, which are responsive to the *1989 Access Order* should be considered by the Commission. *Id.* at 8.

41. NET's admission that its 1989 access tariff filing overstated its interstate revenue requirement for Account 6362 by $5.0 million confirms that portion of our inside wiring disallowance. We will not permit NET to avoid the effects of its error by increasing its interstate revenue requirement allowance for that account above the level that would otherwise be reasonable. As indicated in Section II.A.1, *supra*, NET must submit new PYCOS data for all accounts if it is to correct this and the other errors in the data submitted in connection with 1989 access tariff filing.

c. *NET Transmittal 993 and NYT Transmittal 989*

42. In these transmittals, NET and NYT seek to increase their interstate revenue requirement allowances for Account 6362 by $13.0 million and $33.3 million, respectively. These requests are based on claims that at least 72.8 percent of NET's forecast and 73 percent of NYT's forecast Account 6362 expenses are regulated.

i. *Summary of NET Transmittal 993*

43. In Transmittal 993, NET proposes to recapture $13 million of the remaining $14.6 million disallowance of inside wiring expenses. NET argues that the demarcation point for its inside wiring is different from the BellSouth standard used by the Bureau, and claims that the differing demographics in its service territory support its conclusion. NET also asserts that its accounting procedures differ from those in the *1989 Access Order*, and result in fewer nonregulated costs being allocated to Account 6362. NET Tr. 993, D&J at 3-31.

44. MCI argues that NET's reliance on its own internal procedures to justify its inside wiring allocations is inapposite since the Bureau has already audited and rejected NET's procedures. MCI agrees with the Bureau's use of the BellSouth standard as the appropriate industry percentage calculation for regulated and nonregulated inside wiring. According to MCI, it is the appropriate standard for NET since NET's cost allocation differences appear to be attributable to errors in methodology and implementation -- not differing demographics and demarcation points, as NET contends. MCI Petition, NET Tr. 993 at 4.

45. AT&T contends that, contrary to NET's claim, the record does not show that NET has a disproportionately high percentage of multitenant structures, which would otherwise account for the increased amount of regulated network terminating wire. AT&T Petition, NET Tr. 993 at 5-6. AT&T asserts that the number of one- and two-family dwellings in NET's service area is only slightly lower than the number of such dwellings in BellSouth's service area, which is the area the Bureau used to establish the 32

percent regulated inside wiring standard. *Id.* at 6. Moreover, AT&T argues that NET's accounting procedures are inconsistent with the Commission's requirements. AT&T asserts that NET classifies as regulated certain functions, such as travel time associated with network interface installation, visits in which no trouble was detected, and visits by technicians who failed to gain access to customer premises, which should have been classified as nonregulated. *Id.* at 6-9. US Sprint urges arguments similar to AT&T's. US Sprint Petition, NET Tr. 993 at 5.

46. In its reply, NET contends that it has adequately demonstrated that its cost allocation practices and procedures for inside wiring and the placement of demarcation points are consistent with Commission precedent, and that its installation and maintenance time reporting complies with these practices and procedures. NET Reply, Tr. 993 at 2. NET avers that its forecast of 72.8 percent regulated Account 6362 expense is reasonable considering that 22 percent of NET's inside wiring expenses are associated with special services operations, virtually all of which is regulated, and 58 percent of NET's Account 6362 expenses are associated with customer services installation, 73 percent of which is regulated. NET argues that none of these assertions is challenged by the petitioners. *Id.* at 4.

47. With respect to the remaining 20 percent of its inside wiring forecast, NET disputes AT&T's use of demographic data with respect to single and multiple family dwellings. NET states that, based on its calculations, the average two-family home will have 20 times more regulated terminating wire (NTW) than the average single family home, and that it has a much higher percentage of two-family homes than BellSouth (24.6 percent versus 7.6 percent). *Id.* at 5 n.5. Thus, NET argues that AT&T distorts the data by lumping single-family homes with two-family homes, and asserts that in proportion to total dwellings, NET has almost twice as many multi-family dwellings as BellSouth, accounting for its significantly higher proportion of regulated Account 6362 expense. *Id.* NET further asserts that when a network interface is installed and nonregulated installation work is performed in the same visit, its technicians allocate travel time between regulated and nonregulated, rather than entirely to regulated as AT&T claims. *Id.* at 6. Finally, NET argues that when it provides no nonregulated service during a maintenance visit, the expenses associated with that visit are properly assigned to regulated costs, and that to do otherwise would conflict with the Commission's policy that regulated and nonregulated costs should be separated on a cost causative basis. *Id.* at 7.

ii. *Summary of NYT Transmittal 989*

48. In Tranmsittal 989, NYT claims $33.3 million of the $41 million disallowed for inside wiring expenses should be allowed. NYT argues that its demarcation point is different from the BellSouth standard used by the Bureau, and claims that the differing demographics in its service territory support its conclusion. NYT Tr. 989, D&J at 9-12. NYT further contends that its accounting procedures differ from those relied upon in the *1989 Access Order*, resulting in a higher percentage of regulated costs in Account 6362. NYT also argues that the revenues and expenses associated with inside wiring repairs and maintenance are directly assigned to nonregulated accounts, and that its forecast of the proportion of Account 6362 allocated to regulated expenses is accurate. *Id.* at 12-30.

49. In its petition, US Sprint asserts that NYT's budget forecast, while supported by its own audits, does not meet the standards used by the Commission and therefore cannot be accepted as the basis of increased interstate access charges. US Sprint Petition, NYT Tr. 989 at 3. US Sprint argues that all costs associated with maintenance visits in which troubles were not detected in the regulated network should be considered nonregulated, even when NYT does not provide any nonregulated maintenance service. *Id.* at 2 n.2. US Sprint submits that NYT has offered no compelling reason why the Bureau's analysis and resulting inside wiring revenue requirement disallowances are incorrect or not applicable to NYT. *Id.* at 4. In its petition, MCI essentially repeats the arguments it raises with respect to NET Transmittal 993. MCI Petition, NYT Tr. 989 at 4.

50. The 70th Street Block Association (Association) challenges NYT's audit and special study, and the structure and organization of Account 6362. Association Petition, NYT Tr. 989 at 2. The Association asserts that, other than the wiring of new structures, the costs for maintaining and replacing existing inside wiring should be comparatively small. The Association alleges that NYT's structure lends itself to the reuse of existing regulated wiring and that NYT has provided the Commission with misleading information and irrelevant or unsupported data, and has failed to prove that the Bureau erred in disallowing $33.1 million for the Account 6362 portion of NYT's interstate revenue requirement. *Id.* at 3.

51. In its reply, NYT makes essentially the same arguments that NET states against the petitioners' contentions regarding its inside wiring in Transmittal 993. However, in contrast, NYT states that its regulated Account 6362 expense forecast of 73.4 percent is reasonable since 32 percent of NYT's inside wiring expenses are associated with special services, virtually all of which are regulated, and 34 percent of those expenses are associated with customer services installation, 84 percent of which is regulated. NYT alleges that none of the petitioners challenges these assertions. NYT Reply, Tr. 989 at 2-3.

52. In response to US Sprint's allegation, NYT contends that Transmittal 989 incorrectly indicated that it was NYT's policy to charge expenses for maintenance visits where no trouble was detected in the regulated network, even when NYT does not provide nonregulated maintenance. NYT asserts that it actually charges time spent on these types of troubles to nonregulated accounts. *Id.* at 5. Therefore, NYT maintains that it conforms with the *1989 Access Order* despite the fact that it believes that nonregulated treatment of these expenses is in direct conflict with the Commission's policy that regulated and nonregulated costs should be allocated on a cost causative basis. *Id.* at 4-7.

iii. *Analysis of NET Transmittal 993; NYT Transmittal 989*

53. NET and NYT employ similar methodologies in calculating these percentages. These companies maintain that their wiring operations are divided into special service, customer service installation, and customer service maintenance categories. NET and NYT provide percentages for the proportions of their overall wiring costs that are associated with the respective categories as well as the proportion of each category that is classified as regulated. The two sets of proportions apparently reflect the results of NET's and NYT's time reporting systems. NET and

NYT contend that those results form a reliable starting point for determining their interstate revenue requirements for Account 6362, because special service technicians assertedly perform very few nonregulated functions and because various studies assertedly have confirmed the reliability of NET's and NYT's time reporting practices for customer service maintenance and customer service installation.

54. Our review leads us to conclude that NET and NYT have been unable to provide reliable data regarding the percentages of their overall wiring operations that should be associated with their special service, customer service installation, and customer service maintenance operations, as well as the proportion of those operations their field technicians classify as regulated. This failure alone casts doubt on the accuracy of the 72.8 percent and 73 percent figures NET and NYT employ as the regulated portions of their forecast Account 6362 expenses. Since those figures, like the 93.1 percent and 83.0 percent figures stated in NET's and NYT's 1989 access filing, deviate from industry norms by substantial amounts, we cannot accept the companies' assertions that their wiring operations are disproportionately regulated.

55. In addition, the studies on which NET and NYT rely do not confirm the reliability of their time reporting practices. With one exception, those studies merely examined whether the companies' customer service technicians are able to provide consistent information regarding particular customer premises visits. The studies did not address special service technicians in any way and generally did not examine whether customer service technicians record their time accurately.

56. The one study in which these companies examined whether field technician's record their time accurately concerned customer service maintenance in certain parts of the state of New York. In that study, customer service maintenance foremen, who had attended a refresher course on proper time reporting just prior to the study, accompanied customer service maintenance technicians for a one-day period. The foremen were told to observe the technicians' work activities and to record the time spent on each activity as well as the proper work operation code and trouble report disposition code for each activity.[21]

57. NYT asserts that this study indicates that 65 percent of its customer service maintenance technicians' time is devoted to regulated activities. We disagree. In calculating that figure, NYT weighted its sample results in a manner inconsistent with its sampling criteria. More accurate weighting would have reduced that figure to approximately 53 percent. In addition, the foremen recorded inconsistent work operation and trouble report disposition codes for the same function approximately 10 percent of the time. These errors indicate that a substantial reduction of this 53 percent figure may be appropriate. Finally, we would expect recently retrained foremen to have a far lower error rate during the course of a special study. The 10 percent error rate in this study casts further doubt on the reliability of NYT's and NET's time reporting practices. In these circumstances, we must conclude that increased regulated wiring allowances of $13.0 million and $33.3 million for those companies would be unreasonable.

58. Despite that conclusion, NET's and NYT's filings show that the application of our 32 percent factor may produce unreasonably low regulated wiring allowances for those companies. Those filings indicate that NET's and NYT's service areas and practices regarding the location of the demarcation point differ in certain respects from those of BellSouth. While NET and NYT do not attempt to quantify the effect of these differences, we believe that they warrant some adjustment in NET's and NYT's regulated wiring allowances. Under the circumstances, it appears reasonable to permit NET to classify as regulated 52 percent of its wiring expenses and to permit NYT to classify as regulated 56 percent of its wiring expenses.[22] We therefore increase NET's and NYT's respective interstate revenue requirement allowances for Account 6362 by $6.4 million and $19.4 million.

4. *US West*

59. In Transmittal 241, US West asserts that its inside wiring disallowance was incorrectly distributed among the Part 69 categories. US West states that in order to comply with Section 69.401(c) of the Commission's Rules, 47 C.F.R. § 69.401(c), $0.164 million should be shifted from special access to common line. This change has no impact on the total interstate revenue requirement. US West Tr. 241, D&J at 2-4. In Transmittal 247, US West challenges the Bureau's inside wiring disallowances, alleging that the Bureau overallocated Account 6362 information to Category 1, and made errors in its allocation of this expense to Category 2. These changes would increase US West's rates by $3.789 million. US West Tr. 247, D&J at 2-6 to 2-8.

60. US West also alleges that numerous variations among the LECs, such as location of the demarcation point, differences in accounting practices, and economic and other differences, make the 32 percent test used by the Bureau overly rigid and inapplicable to US West's circumstances. US West asserts that its use of a separate subsidiary for inside wiring has a significant impact. These changes would increase US West's rates by $3.151 million. *Id.* at 2-8 to 2-9.

61. MCI argues that the Commission should not accept US West's revised inside wiring expenses based on its assertion that inside wiring costs are contained in a separate subsidiary since US West provides no financial statements of the separate subsidiary, and no description of the methods used to allocate inside wiring between regulated and nonregulated activities. MCI Petition, US West Tr. 247 at 4. AT&T makes essentially the same arguments against US West's request to recover its inside wiring disallowances and recommends that Transmittal 247 be suspended and investigated. AT&T Petition, US West Tr. 247 at 6-7.

62. US West replies that, contrary to the petitioners' contentions, it has provided a detailed derivation of its Account 6362 data, and sufficient evidence to discredit the Bureau's across-the-board application of a single BellSouth audit to all LECs' inside wiring expense. US West Reply, US West Tr. 247 at 7-10.

63. Under the *1989 Access Order*, US West's interstate revenue requirement allowance for regulated wiring is $3.2 million less than the level claimed in US West's 1989 access tariff filing. In Transmittal 247, US West seeks to increase its regulated wiring allowance by that amount. US West argues that it performs inside wiring work through a separate subsidiary that all other BOCs would perform through their operating companies. US West contends that the costs of this work should be added to its operating companies' wiring costs prior to the application of the 32 percent test. Such a procedure would reduce the

regulated portions of the wiring expenses in the four US West study areas receiving inside wiring disallowances, Arizona, Colorado, Nebraska, and Washington, to 24.8 percent, 26.7 percent, 39.2 percent, and 35.0 percent, respectively.

64. US West addresses one respect in which its overall practices for inside wiring apparently differ from those of other regional holding companies. It does not address other respects in which those practices may differ. Nor does it attempt to show that its overall time reporting practices for inside wiring are consistent with Commission requirements.[23] In these circumstances, we find that US West's request for an increased revenue requirement allowance for regulated wiring is unjustified, and therefore reject its request.

B. *CrossSection Analysis*

1. *Ameritech*

65. In Transmittal 316, Ameritech challenges the Bureau's method of calculating the standard deviation from the industry mean for total plant in service (TPIS) cost categories and argues that a statistical error resulted in an understatement of the allowable upper limit of its applicable costs. Ameritech claims that making this correction results in a $1.449 million reduction in its disallowance. Ameritech Tr. 316, D&J at 2-5. Ameritech also argues that the Bureau's cross-section analysis erroneously identified cable and wire facilities (CWF) categories 2 and 3 and (central office equipment) COE category 4.13 for disallowances. It argues that the high growth rates associated with these cost items are due to a new separations study it has performed, implemented on April 1, 1989. Ameritech computes an adjustment to the disallowance for Ohio and Indiana of $10.093 million to correct for the supposed erroneous analysis. *Id.* at 6-12 & Attachment A.

66. MCI argues that the use of the formula for the standard error of the mean under the Bureau's cross-section analysis was appropriate and lenient on the LECs. MCI Petition, Ameritech Tr. 316 at 3. MCI asserts that Ameritech is seeking preferential treatment by asking the Commission to evaluate its costs on a different basis than the Bureau evaluated all of the other Tier 1 LECs. *Id.* at 4. MCI also challenges Ameritech's introduction of new basic separations studies in support of reductions for cross-section disallowances and related depreciation expenses for Ohio and Indiana. MCI contends that Ameritech has not supplied sufficient data to support its proposed changes. *Id.* at 5.

67. Ameritech replies by asserting that when the entire universe of companies is included in an analysis, generally accepted statistical practice requires that the standard deviation of the population be used rather than the standard deviation as calculated by the standard error of the mean, which Ameritech avers was used in the Bureau's cross-section analysis. Ameritech Reply at 5. Ameritech claims that since the entire universe and not a sample was used in the cross-section analysis, the use of the standard error of the mean results in a disallowance formula based on an arbitrary and statistically incorrect analysis which incorrectly raises the level of disallowances. *Id.* at 5-6. Moreover, Ameritech maintains that it provided sufficient data in Transmittal 316 and its TRP to support investment shifts and growth rates reflected in the new basic studies. *Id.* at 7. Ameritech contends that MCI offers no specific data to dispute the detailed explanations contained in Transmittal 316. *Id. at 6-7.*

68. Ameritech's first argument is without merit. First, although the statistic used 1989 *Access Order* was termed the "standard error," the statistic used was, in fact, the standard deviation of the growth rates of the entire population of Tier 1 study areas for each cost category. Second, the formula Ameritech proposes is the standard deviation of the ratio of two variables, costs in 1988 and 1989, both of which have their own variance. We reject Ameritech's argument that this is the more appropriate measure to use. In addition, we reject Ameritech's second argument for two reasons. First, the data provided by Ameritech are insufficient to determine the correct effect of its proposed change. Second, the application of these new separations studies is inconclusive when applied on a piecemeal basis to support revenue requirement increases. As discussed in Section II.A.2, *supra*, the submission of incomplete data does not afford us the opportunity to examine the company-wide effect of these and other studies, which may yield offsetting results.

2. *Bell Atlantic*

69. In Transmittal 311, Bell Atlantic submits central office equipment (COE) data which were omitted from its Chart COS-8 filed with its TRP. Bell Atlantic asserts that a cross-section analysis of the corrected data will reduce the amount of its TPIS disallowance by $1.2 million. Bell Atlantic Tr. 311, D&J at 17.

70. MCI argues that Bell Atlantic should not receive preferential treatment and be able to supply new data to correct its earlier submitted erroneous data. MCI observes that, like all other LECs, Bell Atlantic was subject to the same conditions and time frame for submitting data, and was responsible for the accuracy of that data. MCI Petition, Bell Atlantic Tr. 311 at 7.

71. Based upon the discussion in Section II.A.1, *supra*, we do not accept rate increases based on such a correction of erroneous data.

3. *General Telephone Operating Companies (GTOC)*

72. In Transmittal 504, GTOC challenges the Bureau's disallowance of its cable and wire facilities (CWF) category 1 costs in California and Florida. GTOC submits data reflecting 1988 actual investment for CWF category 1 for California and Florida, and suggests that the Commission consider its cost projections for that category based on its actual 1988 costs rather than the annualized data from the first nine months of 1988. GTOC claims this is appropriate since its 1988 actual costs exceed the 1988 historical data it submitted with its annual 1989 access tariff filing. GTOC asserts that the category 1 growth rates determined by the Bureau are too low, especially when compared to historical growth rates since 1985. GTOC Tr. 504, D&J Part 1.

73. GTOC also asserts that its forecasted level of COE category 4.12 investment for Florida in 1989 is the correct amount and the Bureau should not have disallowed $48.225 million to reduce the investment to the industry mean. GTOC says that the Bureau should have considered the decrease of $80.9 million in category 4.23 (Interexchange Trunk circuit equipment) as an offset to the increase of $60.6 million in category 4.12 (Exchange Trunk circuit equipment). GTOC presents three reasons

why these countervailing changes might set off each other, but does not quantify them. GTOC argues that AT&T migrated from its customer designated location (CDL) at the Tampa 4E office, which led to retirement of $44.3 million of category 4.23 investment, and implies that some of these costs were assigned to state operations. Second, GTOC asserts that the conversion to equal access involves a decrease in interexchange facilities for access, classified as category 4.23, and an increase in direct high capacity trunk groups for high volume interexchange carriers, which are classified as category 4.12. GTOC notes that the number of DS1 and DS3 facilities, which are classified as category 4.12, have increased from 504 in December 1987 to 605 in March 1989. Third, GTOC states that AT&T and GTOC have Interexchange Lease Agreements involving colocated equipment which are expiring. As these agreements expire, AT&T will relocate equipment and will require additional high capacity -- category 4.12 -- facilities. GTOC seeks to recover $8.658 million of its interstate revenue requirement for Florida and $7.629 million of its interstate revenue requirement for California. *Id.* at 3-5.

74. MCI contends that GTOC exceeds the industry weighted mean for its proposed investment in CWF category 1 in California and Florida and for COE category 4.12 in Florida as calculated either by using GTOC's actual 1988 data or by using its first nine months annualized 1988 data. MCI Petition, GTOC Tr. 504 at 2. MCI disputes GTOC's assertion that California and Florida are GTOC's two highest growth areas, noting that GTOC did not cite any regional indicators to support its claim. MCI states that GTOC's projected increase in investment for CWF category 1 based on historical growth figures is not relevant, asserting that GTOC's prior excesses in CWF category 1 investment are no justification for exaggerated projections. *Id.* at 4. MCI alleges that GTOC excluded certain accounts of COE category 4 from its analysis which, if included, would have shown a decline of only 1 percent in all of COE category 4, not 6 percent, as GTOC claims. *Id.* at 5.

75. AT&T states that GTOC seems to challenge the Bureau's cross-section analysis because it is based on the first nine months of 1988 data annualized and fails to take into account higher costs incurred in the fourth quarter of 1988. AT&T, however, argues that the Bureau's method adequately accounts for higher fourth quarter costs because, while the annualized 1988 data do not reflect the fourth quarter of 1988, the prospective 1989 period on which proposed rates were based would encompass the last nine months of 1989 annualized, thereby including the higher costs incurred in the fourth quarter. AT&T also argues that GTOC does not explain the discrepancy between the industry average cost for CWF category 1 and GTOC's substantially higher costs in California and Florida, which it asserts is particularly anomalous in view of the scale economies for serving such densely populated areas. AT&T Petition, GTOC Tr. 504 at 5. Finally, AT&T cites a great discrepancy in projected growth of COE category 4.12 and accompanying growth in facilities, and states that GTOC offers no explanation for the discrepancy. *Id.* at 7.

76. The Bureau has examined the arguments and data provided by GTOC, MCI, and AT&T, and has determined that GTOC's arguments are not persuasive. The cross-section analysis employed annualized 1988 data from all LECs. In general, annualized 1988 data is less than actual 1988 data because expenditures usually peak in the fourth quarter. Comparison of GTOC's growth rates, calculated with actual 1988 data, with those of other LECs, calculated with annualized 1988 data, would unfairly advantage GTOC, since its growth rates would be biased downward. Further, the provision of new data for use in statistical analysis would have to be applied to all Tier 1 LECs to be valid. In addition, the data provided do not support the growth in investment. For example, even though, as GTOC notes, DS-1 and DS-3 demand are growing at a 25 percent rate in the test period, COE category 4.12 investment is growing at a 55 percent rate. Moreover, the amounts of increased investment are not adequately quantified. Therefore, we conclude that the original disallowance should not be altered and we reject GTOC's proposed revisions.

4. ***New England Telephone***

77. In Transmittal 990, NET suggests that its forecasts be reduced to the industry mean only in the states with data errors, and that the report card test be recalculated using its actual 1988 data rather than with the annualized 1988 data previously used. NET submits that recalculation on a state-by-state basis reduces the disallowance by $9.4 million. According to NET, actual 1988 data rather than annualized data should be used to calculate the disallowances from the cross-section analysis, which would result in a $6.2 million reduction in the disallowance. NET Tr. 990, D&J at 10-11. NET further argues that the cross-section analysis disallowed overhead costs, such as marketing, that had already been disallowed in the inside wiring overhead factor. NET asserts that it should recover $2.1 million due to this alleged double counting of some disallowances. *Id.* at 12.

78. AT&T supports the Bureau's method of using PYCOS data for the cross-section analysis, arguing that NET's actual data for the fourth quarter of 1988 need not be considered because the prospective test year for 1989 includes the alleged high-cost last quarter used in setting access rates prospectively. AT&T argues that the Bureau's methodology is fair and that NET's fourth quarter data should not be considered. AT&T maintains that no double counting of NET's marketing expense occurred because the Bureau rescinded the marketing expense disallowance after NET filed Transmittal 982, noting that the disallowance was inappropriate. AT&T Petition, NET Tr. 990 at 5 n.*. Similarly, MCI argues that NET, like all the LECs, must be subject to analysis under the methodology utilized by the Bureau. MCI Petition, NET Tr. 990 at 4-5.

79. In its reply filed jointly with NYT, NET contends that the Bureau reduced SNET's disallowances based on data SNET submitted showing that it had incurred substantially increased costs in the fourth quarter of 1988. According to NET, it should be allowed to do the same. NET/NYT Reply, Tr. 990 at 10 (citing SNET Application 53, filed Mar. 30, 1989).[24] NET claims that its 1988 automated reporting management information system (ARMIS) data, as opposed to its PYCOS data, indicate that it would pass the Bureau's report card test if allowed to incorporate data reflecting significant budget growth in the fourth quarter of 1988. *Id.* at 10-11.

80. NET further argues that AT&T's assertion that fourth quarter growth is accounted for in the Bureau's disallowance is incorrect because the PYCOS period simply averages NET's costs for the first nine months of 1988

and applies it to the fourth quarter. It thus assumes no growth during that period, says NET. NET claims to have experienced larger growth in the fourth quarter of 1988 than the industry in general and argues that its 1988 actual data, which reflect that growth, must be considered by the Commission. *Id.* at 11. Finally, NET contends that AT&T has confused the Bureau's disallowance of marketing expenses in the cross-section test with the Bureau's disallowance of such expenses for LECs that had not assigned sufficient marketing expenses to the interexchange category as required by Part 69 of the Rules. *Id.* at 11-12.

81. In a subsequent filing, Transmittal 993, NET proposes to recover the residual $6.3 million in disallowances that was not included in Transmittal 990, resulting in recovery of the Bureau's entire $24 million budget disallowance. NET Tr. 993, D&J at 2. NET argues that the Bureau's use of the industry average in its expense less depreciation (ELD) cross-section analysis was inappropriate, and claims the Bureau failed to perform a statistical test to exclude the possibility that study area conditions justified variations from the industry mean. Moreover, NET asserts that its cost support fully substantiated its budget forecast. *Id.* at 34.

82. In addition to reiterating its position regarding NET's Transmittal 990, AT&T contends that the Bureau considered and properly rejected the possibility that unique conditions within the study area, such as minutes of use demand and access line growth, could account for deviations from the industry mean. AT&T Petition, NET Tr. 993 at 3-4. MCI repeats the arguments it made against Transmittal 990 and disputes NET's contention that the Bureau should have reviewed its proposed budget at the same level it files its rates and not the study area level, asserting that NET does not budget at the same level it files its rates. MCI Petition, NET Tr. 993 at 6.

83. NET rebuts AT&T's argument, stating that minutes of use or access line growth are only two of many unique conditions that could cause growth rates to vary by study area. NET Reply, Tr. 993 at 15. NET cites a myriad of other factors which have a part in determining budget growth rates, and argues that the cross-section test simply does not consider that a LEC's disaggregated budget for a particular study area or cost category may exceed the industry trend because of the need to meet demands in the particular study area. *Id.* at 16. NET asserts that it is inaccurate to say that the Commission requires the LECs to budget at the study area level. NET contends that the LECs must disaggregate their forecast budgets to the study area level to fulfill the data requirements of the TRP forms, but are not required to budget at the study area level. *Id.* at 17. NET further argues that neither petitioner challenged its explanation for its budget growth rates in the categories in which the Bureau disallowed its costs. *Id.* at 18.

84. We have examined the transmittals and pleadings filed by NET and the petitioners, and have determined that all of NET's claims, except those relating to its assertion of double counting, should be rejected. We find that NET's arguments challenging the ELD disallowances and cross-section methodology should be rejected on the grounds discussed in Section II.A.3 and Section II.B, *supra*. In addition, the cross-section analysis performed by this Bureau considered the possibility that growth rates might differ across study areas and therefore adjusted those rates to the mean plus one standard deviation for that reason. We also find that NET's analysis using 1988 calendar year data results in an "apple and oranges" comparison that has no merit. The cross-section analysis used in the *1989 Access Order* made comparisons across companies based on test year over PYCOS period growth rates. To compare NET's test period over calendar year 1988 growth rate ratio to test year over PYCOS period growth rate ratio for all of the LECs would be an invalid comparison. Further, we decline to alter our original finding that all NET study areas should be failed for the purpose of the cross-section analysis due to egregious errors in NET's Chart COS-8 database. Therefore, we reject all of NET's cross-section arguments, except as noted below, based upon faults in NET's analysis and the discussion in Sections II.A.1, II.A.3, and II.B, *supra*.

85. We do find some merit, however, in NET's double counting argument regarding the inside wiring disallowance. According to NET, the Bureau disallowed Marketing and Corporate Operations Expenses, but then used the original ratio of Corporate Operations + Customer Operations Expenses to the sum of plant specific, plant non-specific, and Customer Operator Services, without adjusting for the specific disallowance, in order to develop an overhead factor to apply to the inside wiring disallowance. To correct this, NET removed the amount of the inside wiring overhead loadings from its forecast data, and re-calculated the cross-section analysis, reducing the cross-section disallowance by $2.1 million. The Corporate Operations disallowance is apportioned to all categories, however, and therefore any double counting of this disallowance in the inside wiring overhead disallowance due to overhead loadings is minimal. The proper calculation of the double disallowance is to multiply the portion of NET's ELD disallowance which was due to the corporate operations disallowance, of $1.844 million, by the inside wiring percentage of total ELD corrected for the inside wiring disallowance. Thus we grant NET's request to the extent of $28,000, calculating this to be the amount of the double counting.

5. *SNET*

86. In Transmittal 467, SNET challenges the disallowances made by the Bureau to its projected COE Category 4.13 investment, totalling $737,000. SNET bases its challenge on both a detailed explanation of the need for the disallowed revenue requirement, in apparent response to paragraph 112 of the *1989 Access Order*, and the provision of recently available actual cost information to further support the reasonableness of its forecasts. SNET Tr. 467, D&J at 1-2. SNET attributes its "anomalously" high projections, in comparison with industry standards, to the installation of subscriber line (SL) carrier systems, used to provide access in rural areas, and extraordinarily high levels of access line growth in Connecticut's rural communities. SNET argues that the new higher concentrations of business users in these areas also require the installation of higher bandwidth facilities which can be used in conjunction with SL carrier systems. *Id.* at 1-4 to 1-5.

87. SNET also provides actual cost data for the growth in Category 4.13, showing a 14 percent increase from August 1988 through February 1989. SNET argues that this trend is expected to continue, and that it will reach its projected investment in this category by August 1989. *Id.* at 2-2 to 2-4.

88. MCI argues that the Bureau's statistical methodology accounts for growth, citing language in the *1989 Access Order* indicating that the Bureau had concluded that its methodologies would allow flexibility even for companies experiencing rapid growth in costs. MCI Petition, SNET Tr. 467 at 2. MCI also avers that SNET's claim is not supported by other filings of SNET, specifically SNET Transmittal 441, filed September 16, 1988, which increased local switching access rates based, in part, on lower than projected demand for switched access minutes of use. MCI concludes that if SNET were experiencing unexpected growth, it would not have had the below forecast demand in its September filing. *Id.* at 2-3. Furthermore, MCI contends that SNET has had two chances to explain any unusual budget increases through its 1989 annual filing or its 1989 errata filing. MCI contends that SNET and the other LECs should not have unlimited opportunities to support claims or increase rates based on the presentation of selective new data, and reasons that a comprehensive view of available data could uncover instances of overforecasts of expenses and investments. *Id.* at 3-4.

89. In its reply, SNET counters that its explanation is valid, because the Bureau's methodology did not allow for growth anomalies below the total company level. SNET states that the growth in its rural areas is abnormally high, and therefore is not reflected in the Bureau's methodology. SNET asserts that the growth in parts of Connecticut during the last two years doubled the previous ten-year average growth. SNET Reply at 2-3. SNET discounts MCI's arguments concerning its September 1988 filing, stating that the filing was made because the rate of growth was lower than that originally forecast in 1988, and cost allocations exceeded 1988 estimates. *Id.* at 4. SNET concludes that its filing is made in response to paragraph 638 of the *1989 Access Order*. *Id.* at 5.

90. The Bureau has reviewed the data and pleadings submitted by SNET and MCI, and we conclude that SNET's transmittal should be rejected. SNET does not quantify the dollar amount of the implied additional investment. In addition, as MCI notes in its petition, on September 16, 1988, SNET filed for an increase in its Local Switching access rates, due in part to an overforecast of switched access minutes of use. If SNET's access lines were in fact increasing, its minutes of use over those lines should also have shown an increase. Examining the subscriber line data provided on DMD-2, the major growth in lines appears to be in 1988, with some slowing of the growth in 1989. Thus, we determine that the information supplied by SNET is insufficient to support any adjustment in the disallowance. Furthermore, SNET's claim is rejected based upon our discussion in Section II.A.2, *supra*, insofar as it relies on new piecemeal data.

6. *US West*

91. In Transmittal 241, US West challenges the Bureau's $2.406 million TPIS disallowance since the remainder of the disallowance was attributed to COE category 2 tandem switching expenses. US West avers that the high growth rate contributing to this expense is directly associated with its projected installation of a local access and transport area (LATA) tandem switch in the State of Washington. US West Tr. 241, D&J at 2-2.

92. MCI asserts that US West should not be allowed to include the Washington tandem switch as part of its 1989 TPIS since it will not be operational until 1990. MCI Petition, US West Tr. 241 at 5.

93. In response, US West contends that when the capital budget for the 1989 access filing was being developed, it had projected that a tandem switch for the Seattle LATA would be booked as TPIS in 1989, and that although work on the tandem would only begin in 1989, the in-service date of May 1990 causes it to be classified as short term telephone plant under construction, and therefore part of TPIS. US West Reply, Tr. 241 at 7.

94. Upon a review of the transmittal and pleadings we have determined that US West's argument is unconvincing, particularly since US West did not proffer this explanation initially in its filing as a basis for the sharp increase in its projected TPIS costs. We therefore reject this claim as deficient in the support and data filed, and because of the discussion in Section II.A.2, *supra*.

95. In Transmittal No. 247, US West argues that the cross-section analysis should have been performed at the regional level, not the study area level, and that disallowances should have been made on net rather than gross investment. US West Tr. 247, D&J at 2-1 to 2-3, 2-5. AT&T asserts that US West's argument ignores the fact that its special access rates are filed on a regional level, the Bureau has mandated the filing of TRP data by study area, and separations studies and demand data are compiled on the study area level. AT&T Petition, US West Tr. 247 at 5-6. MCI argues that US West had ample opportunity to challenge the Bureau's analysis and findings in the past, and should not be allowed to do so now. MCI Petition, US West Tr. 247 at 3. In its reply, US West asserts that while the Bureau methodology may be proper for companies with rates set at the study area level, LECs with rates set at more aggregated levels should not be subject to this methodology. US West also asserts that more aggregated data would be more accurate. US West Reply, Tr. 247 at 3-6.

96. We have analyzed the arguments of US West and the petitioners, and conclude that US West makes no convincing argument in favor of altering the Bureau methodology. The *1989 Access Order* reflects the fact that the LECs are required to forecast and report actual operating statistics on a study area basis for hundreds of accounts and separations categories. Hence, the analysis is based on the application of the cost allocation procedures that the Commission's Rules require companies to follow (*e.g.*, Parts 32, 36, 69) for reporting actual operating statistics, and the fact that the *Cost Support Order* and *Waiver Order* require proposed test year budget forecasts be filed in the annual access tariff proceeding. The Bureau must also be able to ascertain during review that the interstate portion of the budgets has been separated in accordance with Part 36 of the Rules, which requires allocation on a study area basis. Forecasts which are not made on a study area level of detail cannot be so evaluated. Each study area has different interstate separation factors applicable to the same cost item, so it is important that each cost item be correct on a state basis, rather than merely on a regional basis. Furthermore, statements by US West that budgeting is performed on a regional basis and should only be subject to regional review are unconvincing because of the fact that each state public utility is obligated to evaluate the budget view for the particular state in which it operates.

97. In addition, the use of gross investment for analysis is superior to the use of net investment because net investment incorporates various assumptions regarding the remaining useful life of assets, which could distort our analysis. Furthermore, if a net investment methodology were employed, the analysis would be influenced by changes in depreciation expense and reserve which are properly analyzed separately, and addressed in other sections of this Order. We therefore reject this US West claim on the grounds discussed herein and in Sections II.A.3 and II.B, *supra*.

C. *Trend Analysis*

1. *Ameritech*

98. In Transmittal 316, Ameritech submits that its inside wiring expense, Account 6362, was subject to duplicative disallowances and asserts that inside wiring should be removed as an element of the trend analysis. Ameritech also provides fourth quarter data to compute a new trend disallowance for Indiana Bell and Wisconsin Bell, and provides the corresponding historical inside wiring data for use in the Bureau's trend model. Ameritech Tr. 316, D&J at 18-21 & Attachment A. Ameritech further argues that the Bureau's trend analysis should include its 1988 fourth quarter costs, which would make its growth rate based on the trend line regression higher, resulting in the reversal of $3.2 million of budget disallowances. *Id.* at 20-21.

99. AT&T argues that Ameritech's fourth quarter data should not be included in the Bureau's trend analysis because the allegedly higher fourth quarter costs have already been reflected in proposed 1989 access rates. AT&T argues that since the prospective test year for the 1989 filing is the last nine months of 1989 annualized, it therefore includes high year-end costs. AT&T Petition, Ameritech Tr. 316 at 2.

100. MCI argues that Ameritech's inside wiring expense should not be removed from the Bureau's trend analysis because to do so the Commission would have to calculate a new industry mean and standard deviation on which to base any new disallowance for all LECs. MCI Petition, Ameritech Tr. 316 at 8. MCI contends that Ameritech's newly submitted fourth quarter data should not be considered since the Bureau reviewed all the LECs' data on equal terms, and that if the methodology were modified all LECs should be required to supply similar data. *Id.* at 9. MCI alleges that Ameritech has not demonstrated that the rate increase it seeks is necessary for it to recover its authorized rate of return, as required by Sections 61.38(b)(1) and 61.38(c) of the Commission's Rules. *Id.* at 9.

101. In response, Ameritech claims that MCI's objection to the elimination of inside wiring from the trend analysis is baseless because the Bureau's analysis was based on individual LEC expense and investment data for the years 1984 to 1988, and thus no industry average or standard deviation was employed by the Bureau, and no recalculation of the industry mean would be required. Ameritech Reply at 8-9. Ameritech rejects AT&T's claim that it submitted 1988 fourth quarter actual data to make its historical growth rate higher than the trend, asserting the information was provided as an additional data point designed to enhance the predictability of the Bureau's analysis. *Id.* at 9. Lastly, Ameritech contends that Transmittal 316 fully complies with Section 61.38 of the Commission's Rules since specific cost of service, traffic, and revenue information has been submitted and a waiver of Section 61.38 was granted by the Bureau allowing Ameritech to incorporate annual access support material into Transmittal 316. *Id.* at 9-11.

102. The Bureau has reviewed the data and arguments provided by Ameritech, as well as the petitions. We decline to make the adjustments requested by Ameritech which are based upon the new data because these data are piecemeal, relating to only two of Ameritech's companies, and only certain of the statistical tests. This method is not acceptable, for the reasons discussed in Section II.A.2, *supra*. It is impossible, on the data provided, to ascertain the effect of new data on all of Ameritech's interstate operations, and specifically to determine if comprehensive data may indicate offsetting adjustments. We do, however, recognize the presence of the double-counting error made in the Bureau's original analysis, and grant an adjustment in the disallowance to that extent. As noted previously, the correct calculation of the double disallowance assumes the equal application of the disallowance to all expense categories. For Indiana, inside wiring is 1.77 percent of total ELD. Therefore, 1.77 percent of the $3.643 million ELD disallowance ($0.064 million) relates to the double counted disallowance for inside wiring. Similarly, for Wisconsin, 0.70 percent of the $4.644 million ELD disallowance ($0.032 million) was double counted in the ELD disallowance.

2. *Bell Atlantic*

103. In Transmittal 311, Bell Atlantic contends that the Bureau's trend analysis should be adjusted to reflect the removal of disallowed inside wiring and revenue accounting expenses. Bell Atlantic claims that the Bureau's disallowance of $8.7 million in inside wiring expenses and $398,000 for C&P revenue accounting, in addition to the $20.1 million disallowance for total ELD, constitutes double counting since these expenses are part of total ELD. Bell Atlantic requests reinstatement of these entire amounts, generating a revenue requirement increase of $9.1 million. Bell Atlantic Tr. 311, D&J at 15-16.

104. MCI contends that if the Bureau were to remove inside wiring and revenue accounting from the ELD trend analysis for Bell Atlantic we would have to calculate a new industry mean and a tighter standard deviation on which to base new disallowances for all LECs. Therefore, MCI reasons, Bell Atlantic must be judged by the same standards used to measure the other LECs. MCI Petition, Bell Atlantic Tr. 311 at 6.

105. Analysis of Bell Atlantic's submission reveals that while there is a slight disallowance effect, the amount calculated by Bell Atlantic is incorrect. The ELD trend disallowance calculated by the Bureau applies equally to all categories of expenses. Therefore, double-counting attributable to inside wiring may be calculated by multiplying the ratio of Account 6362 to total ELD, which is 0.94 percent, by the ELD trend disallowance of $20.1 million.[25] This calculation yields a revision of $189,000 to the disallowance. The correct revision attributable to revenue accounting is $301,000, which is derived by multiplying the ratio of revenue accounting expenses to total ELD, 1.5 percent, by the $20.1 million disallowance.[26] Based on our analysis of Bell Atlantic's submission and MCI's arguments, we determine that a partial allowance, as calculated above, is reasonable and corrects for the double disallowance.

3. NET

106. In Transmittal 990, NET suggests that the inside wiring disallowance be removed from the 1989 budget forecast to perform the expenses less depreciation (ELD) trend test. Since this adjustment causes NET to pass the ELD trend test, NET contends, the $10.6 million disallowance should be eliminated. NET Tr. 990, D&J at 12-13. In Transmittal 993, NET challenges the ELD trend methodology in conjunction with its challenge to the Bureau's ELD cross-section analysis. NET avers that the entire trend analysis method must be abandoned because of alleged statistical errors. It claims that the trend analysis is invalid because of too few observations, autocorrelation, and non-normality of the error terms. NET Tr. 993, D&J at 33-34.

107. MCI alleges that the only difference between the trend test used to evaluate 1988 forecasts and the trend test in question is that the Bureau applied tighter standards to judge the reasonableness of 1989 forecasts. MCI Petition, NET Tr. 993 at 5-6. AT&T argues that the Bureau used all the quarterly post-divestiture data which were available to it, except for two quarters generally considered unreliable due to errors made by the LECs when they originally reported the data, and that all coefficient estimates are statistically significant for both the TPIS and ELD trend models. AT&T Petition, NET Tr. 993 at 3.

108. In response, NET again challenges the Bureau's ELD trend test, which was used to calculate a $10.6 million disallowance for NET, as statistically invalid. NET Reply, Tr. 993 at 11. NET argues that the Bureau lacked sufficient data to determine an appropriate functional form for our time trend and corresponding parameters, and therefore that our use of the trend test was not justified to determine LEC disallowances. *Id.* at 12. With regard to AT&T's argument that the ELD trend analysis passes statistical tests for statistically significant regression coefficients, NET asserts that this is irrelevant since the Bureau's test had available too few observations to develop a meaningful forecast. *Id.* at 12. NET submits that the Bureau's error in the *1989 Access Order* was that we did impose tighter standards, asserting that the Bureau's use of one standard deviation was not justified by the Bureau's addition of four quarters of historical data because the extra data still do not develop a reliable time trend. *Id.* at 14.

109. The Bureau has analyzed the pleadings of the parties and the data supplied by NET, and we have determined that NET's analysis is irrelevant because the trend analysis did not lead to the disallowances for NET, since it is less than the disallowances due to the cross-section analysis. In addition, we disagree with the substantive analysis of NET. While it is always better to have more observations, there is no number of observations that will ensure that the assumption of normality of the error terms is correct. Therefore, we reject this argument of NET.

4. US West

110. US West corrects fourth quarter 1987 data for TPIS, and thereby claims that it passes the TPIS report card test. This would result in no disallowance from the trend analysis, and a total TPIS disallowance from the cross-section analysis of only $2.774 million, instead of the $5.164 million imposed in the *1989 Access Order*. US West also requests a $1.052 million reduction in the disallowance for ELD, based upon its representation of passing the TPIS report card test. US West Tr. 241, D&J at 2-1.

111. MCI argues that US West should not be allowed to make corrections to its annual access filing at this time, and that ample time was provided between the initial filing and the errata filings to make necessary changes. MCI Petition, US West Tr. 241 at 3. MCI further argues that US West is making piecemeal corrections that result only in favorable changes. *Id.* at 3.

112. US West replies that the issue is not the timing of the filing, but the validity of the data, and submits a copy of its annual Form M for 1987 to support the reasonableness of the corrected numbers. US West Reply, Tr. 241 at 4. US West also contends that it was simply providing accurate data to support its errata filing, and that MCI's allegation of other unfavorable errors is baseless as evidenced by its failure to specify any such errors. *Id.* at 4.

113. The Bureau has analyzed the data and arguments filed by the parties, and we have determined that US West has failed to make a case for revision of the original disallowance. Since part of US West's request relies on corrections of erroneous TRP data, it is rejected on the grounds discussed in Section II.A.1, *supra*. In addition, since nothing that US West presents in its filing corrects its ELD report card data, its data still fails the ELD report card test. Therefore, US West's analysis is incorrect and its request rejected.

114. In Transmittal 247, US West argues that the trend analysis should have been performed on the regional level. US West Tr. 247, D&J at 2-1 to 2-2. AT&T asserts that US West's argument ignores the fact that its special access rates are filed on a regional level, the Bureau has mandated the filing of TRP data by study area, and separations studies and demand data are compiled on the study area level. AT&T Petition, Tr. 247 at 5-6. MCI argues that US West had ample opportunity to challenge the Bureau's analysis and findings in the past, and should not be allowed to do so now. MCI Petition, Tr. 247 at 3. In its reply, US West asserts that while the Bureau methodology may be proper for companies with rates set at the study area level, LECs with rates set at more aggregated levels should be exempted from this methodology. US West Reply, Tr. 247 at 3-6, *cf.* para. 95, *supra*.

115. We have analyzed the arguments of US West and the petitioners, and conclude that US West makes no convincing argument in favor of altering the Bureau methodology. The analysis methodology used in the *1989 Access Order* reflects the fact that the LECs are required to forecast budgets and report actual operating statistics on a study area basis for hundreds of accounts and separations categories. Hence, the analysis is based on the application of the cost allocation procedures that the Commission's Rules require companies to follow (*e.g.*, Parts 32, 36, 69) for reporting actual operating statistics, and the fact that the *Cost Support Order* and *Waiver Order* require proposed test year budget forecasts be filed in the annual access tariff proceeding. The Bureau must also be able to ascertain during review that the interstate portion of the costs has been separated in accordance with Part 36 of the Rules, which requires allocation on a study area basis. Forecasts which are not performed on a study area level of detail cannot be so evaluated. Each study area has different interstate separation factors applicable to the same item, so it is important that each cost item be

correct on a state basis, rather than merely on a regional basis. Furthermore, statements by US West that budgeting is performed on a regional basis and should only be subject to regional review are unconvincing because of the fact that each state public utility is obligated to evaluate the budget view for the particular state in which it operates. We therefore reject US West's request in Transmittal 247 on the grounds discussed herein and in Sections II.A.3 and II.B, *supra*

D. *Marketing Expense*

1. *BellSouth*

116. In Transmittal 248, BellSouth challenges the Bureau's disallowance of marketing expense because the disallowance methodology is based upon a method inconsistent with Section 69.403 of the Commission's Rules, 47 C.F.R. § 69.403 for accounting for the expense. BellSouth Tr. 248, D&J at 4. None of the petitioners addressed this aspect of BellSouth's filing.

2. *US West*

117. In Transmittal 241, US West argues that the marketing expense disallowance for Pacific Northwest Bell (PNB) is inappropriate for the same reason as BellSouth asserts. US West Tr. 241, D&J at 2-4. US West requests that the revenue requirement associated with this disallowance be reversed, with the result of an increase in its revenue requirement of $490,000. *Id.* at 2-4.

3. *Discussion*

118. The *1989 Access Order* disallowed a portion of certain carriers' marketing expenses because the Bureau's calculations showed that these carriers had assigned too little marketing expenses to the interexchange access element. We have reviewed our calculations, comparing the percentage of investment assigned to the interexchange access element to the marketing expense assigned to that element, and have found that the original disallowances were too high in several instances. The revised calculation of marketing expense disallowances indicates that the disallowances for BellSouth and US West, $203,000, and $491,000, respectively, should be eliminated.[27] Therefore, we will allow part of the requests of these LECs to go into effect.

E. *Revenue Accounting*

1. *Background*

119. In the *1989 Access Order*, the Bureau disallowed revenue accounting costs that were assigned to the common line rate element because the cost estimates appeared to be excessive. The disallowances totaled $12.543 million in interstate revenue requirements and were calculated using data received in the ongoing Docket 80-286 Joint Board proceeding regarding revenue accounting.[28] The Joint Board data indicated that 60 percent of Category 2 costs are attributable to the Other Billing and Collecting subcategory, and most of the respondents, including several LECs, MCI, and the United States Telephone Association (USTA), generally agreed that 5 percent or less of the Other Billing and Collecting subcategory represents the costs incurred for subscriber line charge billing and collecting. Based on this information, we calculated disallowances using the 60 percent and 5 percent parameters.

2. *Ameritech*

120. In Transmittal 316, Ameritech alleges that the Bureau made a computational error which resulted in inappropriate revenue accounting expense disallowances. Ameritech Tr. 316, D&J at 16. Ameritech asserts that correct computations show that Indiana Bell, Michigan Bell, Ohio Bell, and Wisconsin Bell have all projected the common line subscriber line portion of other billing and collection expense to be less than 5 percent, and that Illinois Bell's projected common line subscriber line portion of the other billing and collection expense exceeds the allowable 5 percent by $47,000, which is below the Bureau's $100,000 limit. *Id.* at 17. Ameritech asserts that correction of the Bureau's computational errors results in a reduction of its revenue accounting disallowance of $901,000. *Id.* at 17. None of the petitioners addresses this issue.

121. We have reviewed our calculations and the information submitted by Ameritech and conclude that there should be no disallowance for Ameritech's common line expense. We therefore will allow rate increases to reflect this adjustment.

3. *BellSouth*

122. In Transmittal 248, BellSouth argues that the Bureau's use of 60 percent of Category 2 Customer Service Expense as an estimate of the expenses included in the Other Billing and Collecting subcategory is incorrect. BellSouth maintains that while 60 percent may have been appropriate under Part 31 and Part 67 Rules, 90 percent is more appropriate under the new Part 32 and Part 36 Rules because, under the new rules, computer related expenses have been assigned to a new account. BellSouth therefore challenges the Bureau's disallowance of $3,223,000 of its revenue accounting expense, Account 6620, because the amount of the expenses and the disallowance are based on 1987 data accounted for under the previously effective Part 31 Rules regarding billing and collection. BellSouth further argues that, under the interim rules, billing and collecting expenses are determined based on an analysis of the work performed and will vary from study area to study area. BellSouth concludes that a maximum assignment of 5 percent to the Common Line rate element is improper. BellSouth Tr. 248, D&J at 5-6.

123. MCI argues that BellSouth's disallowance for Account 6620 is based on current billing and collection data accounted for under Part 32 of the Rules, rather than 1987 billing and collection data accounted for under Part 31 of the Rules, as claimed by BellSouth. According to MCI, 72 percent of the revenue accounting expense was allocated to billing and collection in 1987 and the amount of those expenses now allocated to billing and collection is only 60 percent, which was the amount applied to the Part 32 data supplied in the 1989 Annual Access Tariffs. MCI Petition, BellSouth Tr. 248 at 5. MCI also contends that the 5 percent of other billing and collection costs found by the Bureau to represent costs incurred for subscriber line charge billing and collection under the interim rules is reasonable, appropriate, and based on the best information then available. *Id.* at 5. Additionally, MCI alleges that BellSouth has made no showing that additional revenue accounting expenses are necessary for it to recover its authorized rate of return. *Id.* at 6.

124. AT&T argues that BellSouth's assignment of 6 percent of its other billing and collection expenses to the interstate common line rate element exceeds the 5 percent

limitation on such an assignment. AT&T Petition, Tr. 248 at 5. AT&T submits that BellSouth has not provided the work function study necessary to justify its 6 percent allocation of the other billing and collection subcategory of revenue accounting to the common line rate element, and that the resulting $1.28 million of additional common line revenue requirements should therefore be disallowed. *Id.* at 6.

125. BellSouth maintains that certain costs included in revenue accounting under Part 31 are not under Part 32, which results in approximately 90 percent of revenue accounting expensed being represented by other billing and collection expenses under Part 32. BellSouth Reply at 5. BellSouth contends that the differences in the make up of revenue accounting under Parts 31 and 32 should have been taken into account but were not. *Id.* at 5. BellSouth argues that no limitation on the allocation of the other billing and collection subcategory of revenue accounting exists, and asserts that the Joint Board recognized that the 5 percent level referred to by AT&T was only the minimum and not the maximum allowable allocation. *Id.* at 6.

126. We have analyzed the data and arguments filed with respect to BellSouth's transmittal, and conclude that a partial allowance is reasonable based upon BellSouth's argument regarding the percentage of the Revenue Accounting category that is assigned to the Other Billing and Collecting Expense subcategory. Analysis of BellSouth's revenue accounting data indicates that, under Part 32 Rules, Southern Bell assigns 91 percent and South Central Bell assigns 86 percent of Revenue Accounting Expense to the Other Billing and Collecting subcategory. We recalculated the Common Line portion of Other Billing and Collecting expense for the BellSouth operating companies using the new percentages. The result of the recalculations is no disallowance for Southern Bell, for an increase in revenue requirements of $1.354 million, and a revision of $1.507 million to the disallowance for South Central Bell, for an increase of $.362 million in revenue requirements.

127. We also conclude, however, that BellSouth's argument regarding the amount of Other Billing and Collecting Expense assigned to the Common Line rate element is incorrect. The Bureau, in using 5 percent of Other Billing and Collecting Expense as the maximum, is allowing a generous portion of the expense to be assigned to the Common Line rate element. There is no evidence that any company incurs expenses in excess of 5 percent of total Other Billing and Collecting Expense for billing and collecting the subscriber line charge. Further, as explained above, this position is supported by the respondents to the Joint Board proceeding. Therefore, we reject this argument of BellSouth as incorrect.

F. *Depreciation Expense*

1. *Ameritech*

128. Ameritech argues that since the disallowances for the depreciation expense were calculated based upon the original TPIS amounts disallowed, by eliminating the cross-section disallowances for CWF and central office circuit equipment (COCE), the related depreciation expense disallowances totaling $2.5 million should also be eliminated. Ameritech Tr. 316, D&J at 15.

129. MCI contends that the CWF or COCE disallowances established by the cross-section analysis should not be eliminated, and therefore none of the related depreciation expense disallowances for Ohio and Indiana should be reversed. MCI Petition, Ameritech Tr. 316 at 7.

130. In its reply, Ameritech asserts that it has provided sufficient data to support reducing the disallowances resulting from the cross-section analysis for Ohio and Indiana, and that the associated depreciation disallowances should also be eliminated. Ameritech Reply at 6-7.

131. Since the Bureau is rejecting Ameritech's proposed adjustment to TPIS disallowances, this adjustment is also rejected.

2. *Bell Atlantic*

132. In Transmittal 311, Bell Atlantic asserts that the *1989 Access Order* failed to flow through correctly the effect of the depreciation expense disallowances on investment reserve accounts, and therefore uses the procedure set forth in the *1988 Access Order* to calculate a different disallowance. According to Bell Atlantic, this would result in a disallowance recovery of $1.8 million. Bell Atlantic Tr. 311, D&J at 13.

133. MCI asserts that Bell Atlantic's use of a methodology favorable to its particular circumstances and different from the one applied to the other LECs is inappropriate, and that Bell Atlantic has failed to show how the Bureau's method is flawed. MCI Petition, Bell Atlantic Tr. 311 at 5-6.

134. We have reviewed the information and arguments provided by Bell Atlantic and MCI, and conclude that Bell Atlantic has not justified any change in the depreciation expense disallowance. We intended in the *1989 Access Order* to calculate allowable depreciation expenses in a more refined manner than was used in 1988. Thus, we analyzed the depreciation reserves of the carriers and reached a conclusion as to what reserve levels were reasonable for ratemaking purposes. Therefore, our decision to adjust a carrier's depreciation expenses does not warrant a corresponding change in its reserve level, because these items were calculated independently. If we were, as proposed by Bell Atlantic, to make a mechanical change in the reserve level based solely on a change in its depreciation expense, we would no longer be assured that the reserve level is reasonable. We therefore reject Bell Atlantic's suggested adjustment.

3. *BellSouth*

135. BellSouth contends in Transmittal 248 that an error in its TRP resulted in an increase in the Bureau's calculation of the unseparated disallowance for depreciation expense for Mississippi. BellSouth submits corrective data and claims that it should recover $2.222 million of the depreciation disallowance, $.549 million on an interstate basis. BellSouth Tr. 248, D&J at 2-3.

136. MCI argues that any overstatement of depreciation expense would have been offset by the equal understatement of amortization expense, making any miscalculation irrelevant. Additionally, MCI asserts that BellSouth failed to show that an increase in depreciation expense is required for it to recover its authorized rate of return. MCI Petition, BellSouth Tr. 248 at 4. AT&T did not address the BellSouth depreciation disallowance issue in its petition.

137. In its reply, BellSouth contends that MCI's argument that the depreciation disallowance should not be reduced, because a comparison of the Mississippi DEP-1 form and the COS-1 form reveals that the disallowance should have been made, is wrong since the DEP-1 form contained erroneous data. BellSouth submits that it should be allowed to submit corrected data and reduce its depreciation disallowance by $2,222,000. BellSouth Reply at 3.

138. We have examined the information provided by BellSouth and MCI, and have concluded that BellSouth's argument should be rejected. The information upon which BellSouth relies is insufficient and improper as discussed in Section II.A.1, *supra*.

4. ***US West***

139. US West says that its depreciation expense disallowances should be reduced because it believes that a substantial amount of the TPIS disallowance was inappropriate, and therefore, the associated depreciation disallowance was also inappropriate. US West also contends that the Bureau disallowed depreciation expense of $8.052 million for NWB-Minnesota based on an associated TPIS disallowance, even though there was no TPIS disallowance for Minnesota. US West Tr. 241, D&J at 2-3 to 2-4; US West Tr. 247, D&J at 2-4.

140. MCI challenges US West's contention. MCI Petition, US West Tr. 241 at 5; MCI Petition, US West Tr. 247 at 3-4. MCI asserts that the Bureau's TPIS disallowance and any related disallowances are justified since US West's claims are unsubstantiated. MCI Petition, US West Tr. 247 at 8. AT&T arguments are similar to MCI's. AT&T Petition, US West Tr. 247 at 4-7.

141. US West defends the validity of its contentions regarding TPIS disallowances, and the associated depreciation expense. US West Reply, Tr. 247 at 6.

142. We conclude that neither of US West's arguments should be accepted. First, as indicated elsewhere in this Order, we have concluded that the US West TPIS disallowances should not be adjusted. Therefore, an adjustment to the depreciation expense disallowance is not appropriate. Second, contrary to US West's claims, there was a TPIS disallowance for NWB-Minnesota. Appendix C, Workpaper C-3 (TPISDIS), shows a $18.715 million TPIS disallowance for Northwestern Bell. Approximately 43 percent of NWB's TPIS is in Minnesota; as a result, 43 percent of the $18.715 million disallowance, or $8.052 million, of the TPIS disallowance was allocated to Minnesota. This resulted in the depreciation expense disallowance, which should be maintained. We therefore reject these US West arguments.

G. ***Investment Tax Credit***

1. ***Bell Atlantic***

143. Bell Atlantic contends that the Bureau's $2.8 million revenue requirement disallowance with respect to Investment Tax Credit (ITC) amortizations was improper because it assumes that the 1989 ITC amortization rate should be the same as the rate used in 1988. Bell Atlantic argues that this assumption does not recognize the loss of the ITC occasioned by the Tax Reform Act of 1986, which will cause aggregate ITC amortization rates to decline in future years as amortizations are completed and not replaced. Moreover, Bell Atlantic argues, the analysis does not adequately reflect the 1989 effect on C&P of the end of the inside wiring and other amortizations. According to Bell Atlantic, the end of inside wiring amortization alone accounted for nearly $2 million of ITC amortization in 1988 that will not be present in 1989. Bell Atlantic avers that the Bureau's analysis is shown to be flawed by the results of the actual amount of investment tax credit amortization booked by C&P for the first quarter of 1989. These booked amounts, when annualized, suggest that C&P actually overforecast their 1989 ITC amortization rather than underforecast it. C&P's 1989 ITC amortization forecast (combined interstate and intrastate) was $31.28 million while the first quarter of 1989 annualized ITC amortization would be $30.41 million. Bell Atlantic Tr. 311, D&J at 20-21.

144. MCI argues that the Bureau's analysis is not flawed, asserting that the Bureau found that the method used to calculate unamortized investment tax credits considered the loss of amortizations in certain Bell Atlantic accounts which were fully amortized in 1988. MCI contends that Bell Atlantic does not submit any compelling evidence to the contrary. MCI Petition, Bell Atlantic Tr. 311 at 8.

145. Bell Atlantic's claim that the Bureau's analysis failed to consider the effects of the repeal of the ITC under the Tax Reform Act of 1986 is incorrect. The unamortized ITC balances to which the rate applied do not reflect the addition of any new ITCs. The Bureau's method used to calculate the $2.8 million disallowance developed an amortization rate based on the relationship between the 1988 amortization reported by Bell Atlantic in the TRP and the unamortized ITC at the beginning of 1988. The rate was then applied to the 1989 beginning unamortized ITC balance, which was the same as the 1988 ending balance, to determine an amortization figure for 1989. The only change between the 1988 beginning balance and the beginning balance of unamortized ITCs in 1989 that entered into our calculation was the amount of ITC amortization during 1988 reported by Bell Atlantic.

146. We have examined the information and data provided by Bell Atlantic and MCI and conclude that Bell Atlantic's disallowance adjustment should be rejected. We are not persuaded by Bell Atlantic's argument that the analysis of ITC amortizations is inaccurate because it assumes the 1988 effective amortization rate in projecting C&P's 1989 ITC amortization amount. As we have already described, the repeal of the ITC in the Tax Reform Act of 1986 had no effect on the calculation we used to determine the disallowance, as Bell Atlantic contends. We believe our formula gives adequate consideration to amortization terminations because it applies an amortization rate that reflects Bell Atlantic's 1988 amortization to the unamortized balance as of January 1, 1989. Further, Bell Atlantic acknowledges that our analysis partially reflects the effect of ITC amortization amounts included in 1988 that are not includable in 1989; and Bell Atlantic's explanation does not under any circumstance warrant reinstatement of the entire amount we disallowed.[29] We cannot accept the actual amount of ITC amortization booked by Bell Atlantic in the first quarter of 1989 as proof that our analysis was flawed since the amounts recorded in interim periods remain open to adjustment. In addition, Bell Atlantic's contention falls within the category of challenges discussed in Section II.A.3, *supra*.

H. ***Special Access and Demand***

1. *Ameritech*

147. In Transmittal 316, Ameritech argues that the Bureau adjusted Wisconsin's DS1 Local Distribution Channel (LDC) demand from 1,144 to 1,352 million minutes of use without adjusting the revenue requirement to reflect the increase in demand, and that the prospective separations process requires such adjustments. Ameritech further argues that current special access rates do not recover the additional revenue requirement that results from the change in demand. Ameritech proposes rate changes to recover an additional $0.896 million. Ameritech Transmittal 316, D&J at 22-24.

148. MCI agrees with Ameritech that if there is a relative increase in special access demand, more of the total revenue requirement should be allocated to special access, but asserts that other access categories should be reduced by the same amount as a result. MCI Petition, Ameritech Tr. 316 at 10. MCI argues that the separations impact of the $900,000 is considered by Ameritech to be *de minimus* on other access categories, and therefore must also be considered *de minimus* in special access. *Id.* at 10.

149. Ameritech contends that the special access revenue requirement increase must be viewed in the context of the size of the total special access revenue requirement in comparison with total special access demand. Ameritech Reply, Ameritech Tr. 316 at 12. Ameritech maintains that the size of the revenue requirement increase is relatively large in comparison to the total special access revenue requirement, and because the demand is relatively small, the proposed rate change is appropriate. Ameritech asserts that this same phenomenon is not true with respect to other areas of access, including the reallocated common line and switched revenue requirement and corresponding rate development. *Id.* at 12.

150. In the *1989 Access Order*, the Bureau adjusted Wisconsin Bell's DS-1 demand to 1,352 local distribution channels from its originally filed level of 1,144. Ameritech correctly notes that this change in demand will result in a change in revenue requirement, due to separations. The Bureau omitted computation of this adjustment in the Order. Ameritech computes that this will increase the special access revenue requirement by $896,000 and decrease the common line and traffic sensitive revenue requirements by $108,000 and $206,000, respectively. However, it proposes to adjust its rates to reflect only the special access revenue requirement, arguing the other two adjustments are *de minimus*.[30] This is true of the common line revenue requirement, but the traffic sensitive rate would be lowered about 0.25 percent by this adjustment. Based upon our analysis of the arguments and data presented by Ameritech and MCI, we will allow Ameritech's request to adjust its special access revenue requirement by $0.896 million, and direct them to reflect the $0.206 million as an adjustment to its traffic sensitive revenue requirement.

2. *Bell Atlantic*

151. Bell Atlantic in Transmittal 311 challenges calculations in Appendix E of the *1989 Access Order* which resulted in a disallowance of $43 million for special access. Bell Atlantic submits a recent separations study to support its claim to recover $33.1 million of the disallowance. Bell Atlantic Tr. 311, D&J at 9-12. In addition, Bell Atlantic proposes that special access rates be revised to reflect higher demand for two-wire and four-wire WATS services as prescribed by the *1989 Access Order*, which would result in a $6.9 million decrease in the proposed adjustment to special access. *Id.* at 22.

152. AT&T challenges Bell Atlantic's attempt to justify its assignment of 1989 interstate special access investment by comparing it with its June 1988 interstate special access investment using a CWF basic study based on separations Method B. AT&T Petition, Bell Atlantic Tr. 311 at 3. Essentially, AT&T argues that Bell Atlantic's conclusions fail to show any reasonable relationship between its projected escalating costs and declining demand, noting that Bell Atlantic projects 7 percent growth for 1989 in COE categories 4.12 and 4.23 and CWF categories 2 and 3, while also projecting a 35 percent decrease in demand levels. *Id.* at 3-4.

153. AT&T further argues that Bell Atlantic offers no support for its claim (at Tr. 311, D&J at 11) that its proposed increases in special access investment are attributable to spare investment resulting from lost demand being reapportioned among all access services including special access. *Id.* at 6. AT&T contends that its demand analysis was not flawed by its failure to consider subscriber loops because that was one area of special access investment which actually declined as would be expected given declining demand. *Id.* at 4. AT&T asserts that Bell Atlantic's proposed special access rates appear to be overstated by $33.1 million, and that its proposed tariff revisions should be suspended and investigated. *Id.* at 7. MCI makes the same basic arguments as AT&T with respect to the special access and demand issue in its petition. MCI Petition, Bell Atlantic Tr. 311 at 4.

154. We have analyzed the data and arguments of Bell Atlantic and the petitioners. Specifically, Bell Atlantic has provided sufficient support to justify the recasting of its PYCOS data. This calculation, adjusting for an additional allowance of $6.3 million previously granted Bell Atlantic, and then applying the same analysis used in the *1989 Access Order*, produces a disallowance of $33 million, as opposed to the $43 million originally disallowed. Thus, $10 million of the $43 million should be reinstated. However, since $6.3 million of this amount has already been reflected in Bell Atlantic rates, we will allow only the remaining $3.7 million to take effect. We reject Bell Atlantic's two-wire WATS proposal for the reasons discussed in Section II.A.2, *supra*. We do, however, accept Bell Atlantic's revision to its special access rates to incorporate the higher demand levels determined in the *1989 Access Order*. The other arguments and data supplied by Bell Atlantic are insufficient to support an adjustment.

3. *BellSouth*

155. BellSouth argues that the demand level for its DS1 and DS3 local channels should be changed to reflect migration, resulting in an increased revenue requirement of approximately $7.1 million. BellSouth Tr. 248, D&J at 7.

156. MCI argues that the Commission has already rejected BellSouth's DS1 to DS3 demand migration argument and alleges that BellSouth has historically been unable to forecast demand accurately. MCI Petition, BellSouth Tr. 248 at 7. MCI further alleges that BellSouth has not shown or attempted to prove that it will fail to recover its special access revenue requirement at the DS1 demand level we estimated. *Id.* at 8. AT&T makes a

similar argument against BellSouth's proposal to adjust its DS1 and DS3 demand levels. AT&T Petition, BellSouth Tr. 248 at 3-5.

157. In reply to the MCI and AT&T petitions, BellSouth contends that the DS1 demand increase adopted by the Bureau, and the accompanying reduction in DS1 prices, was unforeseen, and created an economic disincentive for customers to convert their DS1 services to DS3. Accordingly, BellSouth argues that its projected increase in DS3 service demand has not and is not likely to materialize. BellSouth Reply at 7. BellSouth submits that its DS3 demand level should be adjusted downward since unforeseen circumstances have directly affected its projection of demand migration to DS3, thereby resulting in increased revenue requirements. *Id.* at 9. BellSouth maintains that it is not foreclosed from adjusting its DS3 demand projections since the Bureau did not make any findings with respect to DS3 demand, which was based upon anticipated migration. *Id.* at 8-9.

158. We have examined the arguments and data provided by BellSouth and have determined that BellSouth's argument that DS3 demand should be adjusted to its estimate of the pre-migration level is unconvincing. As the *1989 Access Order* stated,[31] the increase in DS3 demand projected by BellSouth did not appear to be explained by the decrease in DS1 demand. Data provided with this filing in Exhibit 1 page 2 of 2 also appear to indicate that the growth in BellSouth's DS3 demand is consistent with the "post-migration" forecast as originally filed. We therefore reject Bell South's argument with respect to DS3 demand.

I. *Network Operations Expense*

1. *US West*

159. US West asserts that the disallowance for ELD in Minnesota for network operations expense was caused entirely by an increase in intrastate access expense. US West Tr. 241, D&J at 3-6. US West argues that the intrastate access expense should be removed for purposes of the cross-section analysis, causing it to pass the cross-section report card test. US West requests that the $3.639 million ELD disallowance in Minnesota for network operations expense be reversed. *Id.*

160. MCI argues that Minnesota's switch from an intrastate toll settlement to the access charge methodology during 1989 is an inadequate explanation of the large increase projected for 1989 for Minnesota's network operations expense. MCI Petition, US West Tr. 241 at 5. MCI contends that US West has not provided any information or support which would justify any modification of the $3.693 ELD disallowance.

161. US West asserts that the Bureau accepted a similar adjustment in Ameritech's March 30, 1989, compliance filing and that it merely seeks similar treatment. US West Reply, Tr. 241 at 6-7.

162. An examination of the TRP data for Minnesota in Chart COS-8 of the database shows that, exclusive of access expense, Minnesota projects a decrease in network operating expenses. Therefore, we find that US West's proposed revision of $3.639 million to the Bureau's ELD disallowance is well supported and correct, and we will allow the increase to its revenue requirement by that amount.

J. *Reallocation of Subscriber Line and Carrier Common Line Charges*

1. *Bell Atlantic*

163. In Transmittal 311, Bell Atlantic suggests that the subscriber line charges for Pennsylvania and the District of Columbia should be recomputed so that reductions in the common line base factor portion, which resulted from the *1989 Access Order*, flow through to end users.[32] Bell Atlantic proposes to recalculate the effects of the partial allowance for common line costs so that adjustments are made to subscriber line charges as well as the carrier common line (CCL) rate, in accordance with Part 69 of the Commission's Rules.[33] Bell Atlantic proposes to make decreases in certain subscriber line charges and make offsetting increases in the regional CCL rates.

164. We agree with Bell Atlantic that the subscriber line charges should be recalculated based on the Base Factor Portion cost reductions made in the *1989 Access Order*. These allocations should be performed based on estimates of costs and demand which support the rates to be effective as of July 1, 1989. Bell Atlantic should file tariffs reflecting these changes to be effective no later than August 1, 1989, on not less than 15 days' notice.

IV. REMEDIES

165. Our review of the LEC submissions and other pleadings leads us to conclude that many of the proposed revisions in access rates are not supported by cost justification that is adequate under the circumstances. Although our decision to authorize part of the previously filed charges to become effective pursuant to Section 204(b) does not preclude new tariff filings, the supporting documentation for such a tariff filing should be sufficient to dispel the doubts about the accuracy of particular cost or demand projections, which led us to adopt a partial authorization. Paragraph 638 of the *1989 Access Order* [34] said that future filings to revise the 1989 access rates "must be accompanied by relevant cost support information and we would expect the [sic] a LEC that files rate increases to address fully the considerations which led us to conclude that the rates filed in these transmittals should be subject to Section 204(b) partial authorization." Many of the LEC submissions do not address those considerations or rely upon vague assertions that are not adequately documented. We accordingly conclude that some of the rate changes should be rejected for failure to comply with the Commission's cost support rules and others should be subject to a partial authorization pursuant to Section 204(b).

166. We recognize that various LECs requested and received special permission to omit some of the data or materials required by Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, and that the deficiency in cost support materials might be attributable in part to the omission of such information. This is not, however, sufficient reason to subject ratepayers to rates that appear to be excessive. We note that such special permission orders, which are usually issued by the Tariff Division pursuant to subdelegated authority, typically state that the grant of special permission does not constitute approval by the Commission or the Chief of the Common Carrier Bureau of the proposed filing, and does not prejudice any subsequent action which the Commission or Bureau may take. Inasmuch as our review of these LECs' filings has led us

to conclude that the carriers have not established a basis for the waivers, we are hereby rescinding those Section 61.38 waivers. Any future revisions to increase any of the 1989 access rates must comply with all of the requirements contained in Section 61.38.

167. The Communications Act establishes separate, alternative remedial mechanisms for rates that may be unreasonable in Sections 204(a) and 204(b), 47 U.S.C. §§ 204(a), 204(b). In this case Section 204(b) provides the most appropriate remedy for rates that have been justified in part. Under Section 204(b) the Commission may allow part of a charge to go into effect based upon a written showing by the carrier and an opportunity for written comment thereon that such partial authorization is just, fair, and reasonable.

168. Our use of Section 204(b) to allow access rates to become effective in part, is the same procedure we used in the *1989 Access Order* and in previous annual access tariff filings.[35] The tariff filing and petition cycle has provided carriers and the public with an opportunity for written comment that satisfies Section 204(b) procedural requirements. Substantively, we believe it is preferable to calculate adjustments appropriate to correct apparent errors in the LECs' rates wherever these are identifiable and allow the remainder of the rate to become effective.

169. In order to insure accuracy and timely review of the access rate revisions allowed by this Order, all revisions to traffic sensitive switched rates and special access rates should be implemented as rate adjustment factors (RAFs) to recurring switched traffic sensitive rates and to recurring special access rates, excluding Individual Case Basis (ICB) rates and the special access surcharge rate. RAFs should be calculated for the following Part 69 rate elements, where applicable: local switching, transport, information, equal access, and special access. All revisions to the common line element should be made exclusively to the terminating CCL rate, except as noted above. Allocations of partial allowances among local switching, transport, information, equal access, special access, and common line must reflect cost allocation requirements contained in Part 69 of the Rules.

170. In their support materials, the carriers should demonstrate that the annualized incremental revenues caused by the revised rates do not exceed the partial allowances permitted by this Order and that the revised rates accurately allocate the partial allowances among the Part 69 rate elements. As cost support to be included in the transmittals which implement these rate revisions, tables should be provided which demonstrate the accuracy of the RAF calculation by displaying for switched traffic sensitive and special access revisions: (1) element by element RAFs; (2) revenues for each element calculated as a product of demand estimates filed for the 1989 annual access tariffs, as adjusted by the Bureau in the *1989 Access Order*, and this Order, and rates which are currently effective; and (3) the product of the RAFs and the revenues such that the product equals the partial allowance permitted, plus the revenues in (2), above. For common line revisions, the accuracy of the proposed change should be demonstrated by the following display: (1) the currently effective terminating CCL rate; (2) the proposed terminating CCL rate; (3) the difference between the CCL rates; and (4) the product of the difference multiplied by demand estimates, as revised in the *1989 Access Order*, such that the product equals the partial allowance.

171. We wish to emphasize that these partial rate allowances are not rate prescriptions pursuant to Section 205(a) of the Communications Act, 47 U.S.C. § 205(a). They represent, rather, partial authorizations of rates to the extent necessary to correct apparently erroneous aspects of the rate development process as set out in the LEC tariff filings and subsequent material of record.

V. ORDERING CLAUSES

172. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act, 47 U.S.C. 154(i), that each of the rate changes proposed by any carrier which were not accepted or allowed in part in this Order ARE REJECTED.

173. IT IS FURTHER ORDERED, pursuant to Section 204(b) of the Communications Act, 47 U.S.C. § 204(b), that the rates for any carrier which were accepted in part in this Order ARE ALLOWED IN PART. Those carriers are ordered to issue supplements in compliance with this Order, reflecting reductions and employing Rate Adjustment Factors, no later than July 5, 1989, with a scheduled effective date of July 7, 1989. Subsequent to such scheduled effective date, carriers may file revised rates directly reflecting these partial authorizations and replacing rates based on Rate Adjustment Factors, to be effective on statutory notice.

174. IT IS FURTHER ORDERED that the Special Permissions previously granting waivers of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, ARE RESCINDED.

175. IT IS FURTHER ORDERED that Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, ARE WAIVED for the purpose of compliance with this Order and Special Permission No. 89-445 IS ASSIGNED.

176. IT IS FURTHER ORDERED that the petitions to suspend and investigate or to reject the tariff filings ARE GRANTED to the extent indicated herein, BUT ARE OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

APPENDIX A

Listing of Transmittals and Pleadings

1. Ameritech Operating Companies (Ameritech) Transmittal 316. (filed June 8, 1989; 29 days' notice effective July 7, 1989)

A. MCI Communications Corporation (MCI) Petition to reject or suspend and investigate, filed June 15, 1989.

B. American Telephone and Telegraph Company (AT&T) Petition to suspend and investigate, filed June 15, 1989.

C. Ameritech Reply, filed June 21, 1989.

2. Ameritech Transmittal 323 (filed June 19, 1989; 18 days' notice effective July 7, 1989)

3. Bell Atlantic Telephone Companies (Bell Atlantic) Transmittal 311. (filed May 26, 1989; 45 days' notice effective July 10, 1989)

A. MCI Petition to reject or suspend and investigate, filed June 12, 1989.

B. AT&T Petition to suspend and investigate, filed June 12, 1989.

C. Bell Atlantic Reply, filed June 22, 1989.

4. BellSouth Telephone Companies (BellSouth) Transmittal 248. (filed May 9, 1989; 60 days' notice effective July 7, 1989)

A. MCI Petition to reject or suspend and investigate, filed May 23, 1989.

B. AT&T Petition to suspend and investigate, filed May 24, 1989.

C. BellSouth Reply, filed June 6, 1989.

5. General Telephone Operating Companies (GTOC) Transmittal 504. (filed May 15, 1989; 53 days' notice effective July 7, 1989)

A. MCI Petition to reject or suspend and investigate, filed May 30, 1989.

B. AT&T (late filed) Petition to suspend and investigate, filed May 30, 1989.

6. New England Telephone and Telegraph Company (NET) Transmittal 990. (filed May 3, 1989; 65 days' notice effective July 7, 1989)

A. MCI Petition to reject or suspend and investigate, filed May 18, 1989.

B. AT&T Petition to suspend and investigate, filed May 18, 1989.

C. NET and New York Telephone Company (NYT) Reply (joint reply), filed May 30, 1989.

7. NET Transmittal 993. (filed May 15, 1989; 69 days' notice effective July 17, 1989)

A. MCI Petition to reject or suspend and investigate, filed May 30, 1989.

B. AT&T Petition to suspend and investigate, filed May 30, 1989.

C. US Sprint Communications Company Limited Partnership (US Sprint) Petition to reject or suspend and investigate, filed May 30, 1989.

D. NET Reply, filed June 9, 1989.

8. NYT Transmittal 989. (filed May 15, 1989; 53 days' notice effective July 7, 1989)

A. US Sprint Petition to reject or suspend and investigate, filed May 30, 1989.

B. MCI Petition to reject or suspend and investigate, filed May 30, 1989.

C. 70th Street Block Association Petition for suspension and investigation, filed June 7, 1989.

D. NYT Reply, filed June 9, 1989.

E. NYT Errata to Reply, filed June 12, 1989.

9. Southern New England Telephone Company (SNET) Transmittal 467. (filed April 28, 1989; 70 days' notice effective July 7, 1989)

A. MCI Petition to reject or suspend and investigate, filed May 15, 1989.

B. SNET Reply, filed May 24, 1989.

10. Southwestern Bell Telephone Company (SWB) Transmittal 1815. (filed June 15, 1989; not reviewed in this Order)

11. Mountain States Telephone and Telegraph Company, Pacific Northwest Bell Telephone Company and Northwestern Bell Telephone Company (US West) Transmittal 241. (filed April 14, 1989; 84 days' notice effective July 7, 1989)

A. MCI Petition to reject or suspend and investigate, filed May 1, 1989.

B. US West Reply, filed May 19, 1989.

12. US West Transmittal 246. (filed April 21, 1989; 56 days' notice effective July 7, 1989) (This transmittal merely corrects for rounding errors in Tr. 241)

13. US West Transmittal 247. (filed April 24, 1989; 74 days' notice effective July 7, 1989)

A. MCI Petition to reject or suspend and investigate, filed May 9, 1989.

B. AT&T Petition to suspend and investigate, filed May 9, 1989.

C. US West Reply, filed May 11, 1989.

* The abbreviations used in this appendix are used throughout the Order.

FOOTNOTES

[1] *See* Access Tariff Filing Schedules, Report and Order, 3 FCC Rcd 5495 (1988) (*Tariff Filing Deferral Order*).

[2] Commission Requirements for Cost Support Material To Be Filed with 1989 Annual Access Tariffs, Order, 4 FCC Rcd 1662 (Com.Car.Bur. 1988) (*Cost Support Order*); Annual 1989 Access Tariff Filings, Petitions for Waiver and Petition for Reconsideration, Memorandum Opinion and Order, 4 FCC Rcd 413 (Com.Car.Bur. 1988) (*Waiver Order*).

[3] Annual 1989 Access Tariff Filings, Memorandum Opinion and Order, 4 FCC Rcd 3638 (Com.Car.Bur. 1989) (*1989 Access Order*).

[4] *See id.* at Appendicies F & G.

[5] A listing of all transmittals filed and the associated pleadings is attached hereto as Appendix A. Southwestern Bell Telephone Company has also filed a tariff, as noted in Appendix A. That tariff transmittal will be addressed in a later Order due to the timing of the filing and the associated pleading cycle.

[6] *See Cost Support Order*, 4 FCC Rcd at 1664. In the *Waiver Order*, the Bureau affirmed our requirements for detailed and accurate data, and stated that we would not accept further modifications or less detailed data. *See Waiver Order*, 4 FCC Rcd at 417.

[7] *Cost Support Order*, 4 FCC Rcd at 1667 (*citing* Commission Requirements for Cost Support Material To Be Filed with Access Tariffs on October 3, 1986, Mimeo No. 6356, released Aug. 15, 1986 (Com.Car.Bur.) at para. 17; Commission Requirements for Cost Support Material To Be Filed with 1988 Annual Access Tariffs, Mimeo No. 4219, released July 30, 1987 (Com.Car.Bur.) at para. 24 (*1988 TRP Order)*).

[8] *Id.*

[9] *See* Annual 1987 Access Tariff Filings, Petitions for Waivers of Filing Requirements, Memorandum Opinion and Order, Mimeo No. 6945, released Sept. 16, 1986 (Com.Car.Bur.); *1988 TRP Order*.

[10] *Cost Support Order*, 4 FCC Rcd at 1667-68. In fact, many waivers were granted by the Bureau upon a showing of good cause. *See Waiver Order*. The Bureau also allowed for limited corrections to be made prior to the effective date of the rates.

[11] The term "dummy" numbers describes the practice of providing levels of detail in the COS database by applying assumed relationships to summary numbers in lieu of using actual numbers to achieve the same levels of detail.

[12] There were many problems with the quality of disaggregated cost data supplied by the carriers as cost support for the 1989 access tariffs. Much of the data that we wished to analyze was not sufficiently accurate on the universal basis required by cross-section analysis. Also, the cross-section analysis is properly limited to those cost categories in which inter-company comparisons are valid. For instance, although many cost categories are disaggregated into message and private line prior to separation, variations in private line demand for various companies preclude making inter-company comparisons on this basis.

[13] The trend analysis evaluates the forecasts for overall reasonableness. The trend examines total operating expenses and total plant. The cross-section analysis evaluates operating expenses and plant on a more disaggregated basis by dividing them into 22 major budget items.

[14] *1989 Access Order*, 4 FCC Rcd at 3646.

[15] *Id.*

[16] *Id.* at 3645-46.

[17] *Id.* at 3646-47.

[18] *Id.* at 3647.

[19] Transmittal 316 proposes a $12.7 million increase in interstate expense for Account 6362. In Transmittal 323, Ameritech reduces its request to $11.1 million.

[20] Transmittal No. 323, D&J at 1.

[21] NET and NYT use work operation codes to allocate field technician time between regulated and nonregulated activities. These companies use trouble report disposition codes to define the nature of problems that field technicians have closed out.

[22] These percentages reflect our decision to classify as nonregulated customer premises visits during which a field technician finds a nonregulated problem, but performs no nonregulated repairs. NET and NYT apparently instruct their field technicians to repair inside wiring problems whenever the customer agrees to such repair and the field technicians make marketing presentations to secure such agreement. Thus, the field technicians perform both regulated and nonregulated functions. They discharge NET's public utility obligation to respond to customer trouble reports, and they discharge their obligation to NET's shareholders to market inside wiring services.

[23] US West apparently assigns disproportionate portions of its NA and NTF travel and testing time to regulated activities.

[24] *See* SNET, Transmittal No. 462, filed Mar. 30, 1989. In Transmittal 462, SNET supplied fourth quarter 1988 data to demonstrate that it would have passed the report card test had actual data been used. SNET's filing was different from the filings of the LECs currently under consideration, and therefore sets no precedent. The primary differences are that SNET's filing was based upon actual numbers and not a correction of previously erroneous data, actually caused SNET to pass the test, and was not a piecemeal presentation of data.

[25] This ratio is computed from data on Chart COS-7(P).

[26] This ratio is derived from Chart COS-7(P).

[27] Ameritech had previously recovered $900,000 to correct for this error in its Transmittal No. 296.

[28] In August 1988, in response to requests for reconsideration of several separations issues, including Revenue Accounting Expense, the Commission issued a *Reconsideration Order*, that among other things, referred this issue to a Federal-State Joint Board, reinstated the Part 67 Rules for the Other Billing and Collecting subcategory effective April 1, 1989, and requested comments and data that the Joint Board could use in developing its recommendations to the Commission regarding the separations treatment of the Other Billing and Collecting Expense subcategory. *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 3 FCC Rcd 5518 (1988).

[29] This is especially true when it is considered that Bell Atlantic's C&P Companies underforecasted ITC amortization in the 1988 tariff review process by $3.3 million. The forecasted amount was $39.7 million while the actual amount of ITC amortization was $43 million.

[30] *1989 Access Order*, 4 FCC Rcd at 3691.

[31] *1989 Access Order*, 4 FCC Rcd at 3691.

[32] Bell Atlantic Tr. 311, D&J at 1. Although petitions have been filed against this transmittal by MCI and AT&T, neither of these petitioners addresses this issue.

[33] 47 C.F.R. Part 69. *See* Bell Atlantic Tr. 311, D&J at 3, 24-25, and associated workpapers.

[34] 4 FCC Rcd at 3707.

[35] *See, e.g., 1988 Access Tariff Order*, 3 FCC Rcd at 1314.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATIONS
SERVICES, INC.,
Complainant,

v. File No. E-89-141

BELLSOUTH CORPORATION,
Defendant.

ORDER

Adopted: July 3, 1989; Released: July 14, 1989

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. On June 26, 1989, Allnet Communications Services, Inc. (Allnet) and BellSouth Corporation (BellSouth) filed a joint motion requesting that we dismiss without prejudice the above-captioned proceeding. For the reasons set forth below, the joint motion is granted.

2. This proceeding was initiated by a formal complaint filed by Allnet against BellSouth on April 10, 1989, alleging, *inter alia*, that BellSouth was unlawfully attempting to leverage its control of its regulated local exchange monopoly bottleneck to collect charges from Allnet for services for which BellSouth billed on behalf of AT&T. By Order dated May 8, 1989, BellSouth and the BellSouth Telephone Companies, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company, were granted a 30-day extension of time in which to file responsive pleadings after advising the Commission that the parties were engaged in settlement negotiations which were expected to resolve all matters in controversy. As a result of these negotiations, the parties have reached a mutually satisfactory settlement. However, because the principles of law and fact have not been settled by the settlement agreement, Allnet seeks dismissal without prejudice.

3. On the basis of the statements contained in the parties' joint motion, we conclude that the motion should be granted and the proceeding terminated.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Motion to Dismiss filed jointly by Allnet Communications Services, Inc. and BellSouth Corporation IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITHOUT PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Acting Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-422

In re Applications of

RADIO DELAWARE, INC. File No. BPH-870604MB

ADAMS BROADCASTING CORPORATION File No. BPH-870615MO

For Construction Permit
for a New FM Station
Delaware, Ohio

INITIAL DECISION OF
DEPUTY CHIEF ADMINISTRATIVE
LAW JUDGE JAMES F. TIERNEY

Issued: June 30, 1989; Released: July 14, 1989

Appearances

Robert W. Healy, Esq. (Reddy, Begley and Martin) on behalf of Adams Broadcasting Corporation; *Heidi P. Sanchez and Howard J. Braun, Esqs.*, (Rosenman and Colin) on behalf of Radio Delaware, Inc.; and *Gary Schonman, Esq.*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

PRELIMINARY STATEMENT

1. This proceeding concerns the mutually exclusive applications of Radio Delaware, Inc. (RDI) and Adams Broadcasting Corporation (Adams) for the captioned facilities at Delaware, Ohio. The *Hearing Designation Order (HDO)*, DA 88-1289, released September 14, 1988, specified the following issues:

(a) To determine, which of the proposals would, on a comparative basis, best serve the public interest;

(b) To determine, in the light of the evidence adduced, pursuant to the foregoing issue, which of the applications, if any, should be granted.

2. By *Memorandum Opinion and Order (MO & O)*, FCC 88M-4430, released December 30, 1988, the following issues were added against RDI:

(a) Whether Radio Delaware, Inc. has impermissibly attempted to deprive Adams of its transmitter site;

(b) Whether under the evidence adduced under (a), Radio Delaware, Inc. possesses the basic qualifications to be a Commission licensee.

Adams was assigned the burden of proceeding and RDI the burden of proof under the added issues.

3. Hearings were held in Washington, D.C. on February 7, through February 9, 1989 and the record was closed on the latter date.

4. Proposed Findings and Conclusions were filed March 31, 1989 by RDI; Adams, with leave, filed April 3, 1989; Reply Findings by both parties were filed on April 17, 1989. The Bureau, as is it's custom in mainly comparative cases, has not filed any proposals.

5. While it may not be uncommon for parties to seek and propose findings most favorable to their theses of the case, proposed findings, nevertheless, are intended to serve the objects of a speedy, fair and just resolution of the issues in contest; where such proposals faithfully reflect, in good measure, the evidence of record to that extent, they are readily adopted to achieve those objects (*Cf.* Rule 1.263, 1.264).

6. This, as an Initial Decision, SHALL GRANT the application of Adams Broadcasting Corporation.

FINDINGS OF FACT

Site Issue - (Radio Delaware, Inc.)

7. In 1986, RDI studied whether it could use the site of its current AM station for its proposed FM tower and transmitter; on November 19, 1986, RDI was advised by the Federal Aviation Administration (FAA) that such proposal would not be acceptable (RDI Ex. 14; Tr. 135, 137). On December 23, 1986, a special meeting of the Board of Directors of RDI was held during which James Shaheen, President of RDI, presented to the RDI Board a cost analysis for constructing the proposed Delaware FM station which included, "land for tower, $500 per month . .." (Adams Ex. 8). On May 12, 1987, Peter J. Manos, local counsel for RDI prepared an option to lease property owned by Paul and Georgia Jumper (the Jumper site) (Adams Ex. 6). Under terms of this option, RDI could lease the necessary property for its transmitter site from the Jumpers, for a term of 50 years at $2,100 a year or $175 a month (Adams Ex. 6). On June 4, 1987, RDI filed an application for the Delaware FM facility specifying the Jumper site (Adams Ex. 5A). On July 8, 1987, the Federal Aviation Administration issued a notice stating that the RDI proposal to use the Jumper site would not constitute a hazard to air navigation (Adams Ex. 5I).

8. In August of 1987, Jesse J. Smith was a real estate broker employed by Ross Real Estate in Delaware, Ohio (Tr. 48). JoAnne Adams, President of Adams, came to Mr. Smith, looking for a possible site for her FM radio station (Tr. 72). Mr. Smith showed her property that has been identified as the Gosnell site (Tr. 72-73), which has been also described as being located on Curve Road (Tr. 69). Mr. Smith dealt with no representative of Adams, other than JoAnne Adams (Tr. 69). On June 8, 1987, Mr. Smith executed a letter to Ms. Adams giving her notice that he had located property that met her criteria for the antenna and that the land was listed with his agency for sale (Adams Ex. 5C). Smith told Ms. Adams the listed price for the property (Tr. 83). Ms. Adams stated that Mr. Smith told her that the owners wanted $1,500 an acre for the property, but he thought he might take less and she advised him that that price was acceptable to her (Tr.

581-582). On June 15, 1987, Adams filed its application for the Delaware FM station specifying Jesse J. Smith as the owner's agent and the person to be contacted to ascertain that Adams had reasonable assurance of site availability (Adams Ex. 5B). On July 3, 1987, Ms. Adams wrote to Mr. Smith asking him to notify her in the event the property on Curve Road was sold, so that she may keep her application on file with the FCC current (Adams Ex. 5D).

9. The letter that Mr. Smith gave to JoAnne Adams, giving her notice as to the availability of the Gosnell property, had attached to it site plats and a legal description of that property (Adams Ex. 5C). However, the site the engineer specified in preparing the application was not the Gosnell property, as described in those site plats, but rather property owned by the Solove family (Tr. 587). Ms. Adams was not aware that her engineer had misinterpreted the location on the maps or that Adams had a problem in that the application on file with the FCC specified the Solove rather than the Gosnell property, until late April or early May of 1988, when she contacted Jesse Smith to see that the Gosnell site was still available (Tr. 585).

10. Mr. Smith told her "that someone else had looked at the property, and that they were going to buy it and he said, I think you have a problem" (Tr. 585). Ms. Adams immediately met with Mr. Smith, and he pointed out to her that the site specified in her application "was not the actual Curve Road Property" (Tr. 586). Smith told her that the site specified in her a application was owned by Mr. Solove (Tr. 587). Ms. Adams then secured from Mr. Solove an agreement permitting Adams to use his property (RDI Ex. 24). Since the Solove property was already specified in the engineering portion of Adams' application, on June 9, 1988, Adams petitioned for leave to amend its application to change the person who would confirm reasonable assurance of site availability from Jesse Smith to Richard Solove and in the *HDO* that petition was granted.

11. In July of 1987, James Shaheen received a copy of Adams' application (Tr. 183). He noticed that the site specified in the application indicated that it was at the intersection of Highways 36, 37 and Township Road 273. He knew that these roads ran parallel, and therefore there was no such intersection (Tr. 184). He then had his consulting engineer determine the exact location specified in Adams' application and found it was property owned by Richard Solove (the Solove site) (Tr. 185-186).

12. Jesse Smith was contacted by RDI's local counsel, Peter Manos, regarding a "tract of land I had on Curve Road" (Tr. 50). Subsequently, another real estate broker, Richard Medellon, Mr. Smith's present employer and Peter Manos' partner (Tr. 61) wanted to see the land Smith had available. Mr. Smith showed him the property on Curve Road (Tr. 50). Later, Medellon said to Smith rather than get involved himself that the person who is looking for the property is James Shaheen (Tr. 50).

13. Smith's contacts with Mr. Shaheen concerning the Gosnell site occurred between August 20, 1987, when Shaheen executed an offer to acquire the Gosnell site (Tr. 52; Adams Ex. 5L), and August 31, 1987, when the last counteroffer for RDI to acquire the Gosnell property was executed by Shaheen (Adams Ex. 5L; Tr. 87). As opposed to the agreement, RDI had to lease the Jumpers' property for $175 a month, RDI's option to purchase the Gosnell site of 31.14 acres at $1,200 an acre would cost RDI $37,368 (Adams Ex. 5L). RDI did not amend its financial proposal to reflect the difference between leasing the Jumpers' property for $175 a month or buying the Gosnell site for $37,368 (Tr. 433). In acquiring the option for the Gosnell site, Shaheen knew that it was an exclusive arrangement and Gosnell could not either lease the property or sell it to anyone other than RDI (Tr. 340-341). The RDI amendment specifying the Gosnell site rather than the Jumpers' site was filed on the perfecting amendment date of September 1, 1987. James Shaheen executed the site certification August 25, 1987 (Adams Ex. 5H). He did not execute the final counteroffer on the Gosnell site option until August 31, 1987 (Adams Ex. 5L).

14. James Shaheen denied that as a result of his negotiations with Jesse Smith he had any understanding that JoAnne Adams or anybody from Adams Broadcasting was planning to buy the Gosnell site (Tr. 157, 158, 181, 339-340, 335-356) (Adams Ex. 5K). Shaheen stated that Smith had told him, "that there was very little, if any, interest in this piece of property" (Tr. 181). Shaheen further stated that he was looking at land generally, and that it was Smith that showed him the Gosnell site (Tr. 156). Shaheen stated that he had not asked Smith specifically to take him to that particular piece of property (Tr. 157). Smith had told him that no one wanted to buy the Gosnell site (Tr. 157). Shaheen showed Smith Adams' application (Tr. 158). Shaheen said he asked Smith several times whether he had been contacted by Adams as to a transmitter site (Tr. 158). Shaheen said he wanted to be "absolutely sure" that he wasn't interfering with anybody else (Tr. 158). Shaheen confirmed that during his deposition he had testified that Mr. Smith had never really communicated to him that he had shown the Gosnell site to JoAnne or even a representative of Adams Broadcasting (Tr. 340).

15. On November 4, 1988, during preparation of RDI's Opposition to the Motion to add the site advantage issue, Shaheen wrote to RDI's FCC counsel telling him why he had acquired the Gosnell site (Adams Ex. 7). He stated in this letter, "I was very careful to confirm whether or not he [Mr. Smith] had any deal pending on the land or if any one was interested. It was then that he told me that a party had a 'passing' interest in it. However, he never heard from that party after showing the land to them . . . no price was discussed . . . terms . . . details . . . nothing!" (Adams Ex. 7). RDI states that their acquisition of the exclusive option to acquire the Gosnell site was a mere coincidence because Jesse Smith, the broker for the property, had never told Shaheen that he had ever shown the site to nor had any understanding with JoAnne Adams or Adams Broadcasting Corporation.

16. Smith stated that when he met Shaheen on August 20, 1987, he specifically advised Mr. Shaheen that the Gosnell site was the property he had shown to Adams (Tr. 63). Smith reaffirmed, at the hearing, his prior affidavit statement that when Shaheen contacted him in August of 1987, Shaheen knew with certainty that the Gosnell site was the specific site Smith had shown to JoAnne Adams, and that Shaheen did not ask Smith to show him any other property (Tr. 62-63; 87-88). Smith specifically recalled telling Shaheen that JoAnne Adams had looked at the Gosnell site (Tr. 113).

17. The offers and counteroffers between RDI and the owner of the Gosnell site for RDI's exclusive option commenced on August 20, 1987, with Shaheen first signing an offer, and ended on August 31, 1987, when Shaheen

signed a final counteroffer (Adams Ex. 5L). While Shaheen denies having any knowledge from Jesse Smith that he had shown Adams the Gosnell site or Smith had any understanding as to the Gosnell property with Adams, on August 25, 1987, James Shaheen prepared an affidavit (Adams Ex. 5E) which he asked Jesse Smith to sign (Tr. 66). Shaheen told Smith that he wanted to be able to show that Smith had not shown Adams the Solove site (Tr. 67). In this affidavit of August of 1987, prepared by James Shaheen, Smith stated that he showed a representative of Adams Broadcasting Corporation the Gosnell site (Tr. 67; Adams Ex. 5E).

18. The Jumper site originally specified by RDI had been approved by the FAA on July 18, 1987 (Adams Ex. 5I). On August 27, 1987, RDI amended its application to specify the Gosnell site instead of the Jumper site (Adams Ex. 5H). Even though RDI already had FAA clearance for the Jumper site, the amendment to change to the Gosnell site stated that RDI had been attempting for a year to find a site that would "not conflict with FAA safety requirements," and that "the proposed site is in an area that has been indicated as being satisfactory to the FAA" (Adams Ex. 5H).

19. To repeat earlier findings to better reflect the circumstances surrounding this added issue, Shaheen wrote to his FCC counsel on November 4, 1988: "There were several other reasons but none of which include Adams from entering into an agrerment [agreement] to purchase that land. As a matter of fact, I had assumed that they were all set with their land even though I knew there was some problem since Jesse told me this was the only land he showed them" (Adams Ex. 7). Shaheen stated that he had asked Smith several times whether he had been contacted by somebody from Adams Broadcasting because "I wanted to be absolutely sure that there were no mixups and that I wasn't interfering with anybody else" .(Tr. 158). "There is no way I would want to interfere in another person's opportunity or endeavor to find a transmitter site, therefore, being another applicant, I wouldn't have even pursued it" (Tr. 182).

20. On August 27, 1987, Shaheen prepared an affidavit in which he stated that on August 26, 1987, he contacted Jerry Solove, son of the family that owns the property, specified as the transmitter site in the Adams' application and that Mr. Solove said there is no discussion now nor has there been discussed with anyone regarding the use of their land for a radio tower (Ex. 5J). Shaheen stated that when he prepared the affidavit that RDI used in various motions to add site availability issues against Adams, he was not certain that what Jerry Solove told him was in totality the truth and that it was conceivable that Adams could have been all set with their land (Tr. 364-365).

21. On May 4, 1987, RDI filed a Petition to Deny Adams' application alleging that at the time Adams filed its application, Adams did not have reasonable assurance of site availability and that Adams presently does not have such reasonable assurance. RDI's Petition was supported by the August 25, 1987 affidavit of Jesse Smith in which Smith stated that he had shown Adams the Gosnell site and not the Solove site (Adams Ex. 5E), and also the affidavit from James Shaheen saying he had contacted representatives of the Solove site and that they had no discussions with anyone regarding the placing of a radio tower on the site (Adams 5J). RDI also enclosed therein two maps initialed by James Shaheen in which Mr. Shaheen marked the Gosnell site as being "the location . .. which the realtor (Jesse Smith) told me he showed them (Adams)" (Adams Ex. 5F, 5G; Tr. 354-356).

22. On June 9, 1988, Adams filed a Petition for Leave to Amend to change the name of the person to be contacted to certify that Adams had reasonable assurance of site availability from Jesse J. Smith to Richard J. Solove. On June 22, 1988, RDI filed an Opposition to Adams' Petition basically repeating the allegations it set forth in the May 4, 1988 Petition to Deny.

23. On October 14, 1988, RDI filed a Motion to Enlarge Issues, again enclosing Jesse Smith's August 25, 1987 affidavit (Adams Ex. 5E) and James Shaheen's August 27, 1987 affidavit (Adams Ex. 5J) as the basis for adding site availability, misrepresentation and false certification issues against Adams.

Standard Comparative Issues (Radio Delaware, Inc.)

24. RDI was formed by the Shaheen family in 1973 to purchase daytime-only AM station WDLR, Delaware, Ohio. The shareholders, officers, and Directors of RDI are James Shaheen (33-1/3% shareholder, President, Treasurer and Director); Sylvia Shaheen (26-2/3% shareholder, Secretary and Director); Carl Shaheen (6-2/3% shareholder and Director); Sadie Shaheen (6-2/3% shareholder and Director); Charlotte Shaheen (13-1/3% shareholder, Vice President and Director); Deeb Turk (6-2/3% shareholder and Director); and Marguerite Turk (6-2/3% shareholder, Assistant Secretary and Director).

25. James Shaheen and Sylvia Shaheen are husband and wife, as are Carol and Sadie Shaheen, and Marguerite and Deeb Turk. Carl, Marguerite, and James are siblings, and Charlotte Shaheen is the widow of Fred Shaheen, their late brother (after Fred Shaheen's death in 1976, his widow inherited his 6-2/3% stock ownership and was elected an officer and Director). Except for those changes in 1976, the only other change in RDI corporate structure occurred in 1987, when Carl Shaheen and Deeb Turk become Directors (raising the total number of Directors to seven). All of Radio Delaware's stock is voting stock. Except for Sylvia Shaheen, all of Radio Delaware's stockholders are of Lebanese and/or Syrian descent, and Sylvia, Marguerite, Sadie, and Charlotte are all female (RDI Ex. 1; Tr. 419).

26. All seven RDI shareholders are described to be engaged on a full-time (40 hours or more per week) basis in the day-to-day management of the proposed FM station. The proposed station being a family operation, all seven shareholders are proposed to be involved in decision-making and oversight of the station staff. All, it is said will also have policy-making and supervisory responsibilities (RDI Ex. 3; Tr. 420).

27. RDI began operating WDLR in the beginning of 1974, and since that time, James Shaheen has been its full-time General Manager, while Sylvia Shaheen has worked full-time as assistant to the General Manager, second in control of the station. The other family members (who live in Canton, Ohio) have not been employed at the station, but all of them are Directors, some are officers, all have regularly attended corporate meetings, all have made frequent visits to the AM station, and the five Canton residents have all served as paid consultants to the station. Marguerite Turk also assisted in the community ascertainment conducted in 1973. At a meeting in November 1986, all seven shareholders approved of the filing of

the FM application., and committed themselves to be involved in operating the station (RDI Ex. 5, pp. 1-2; Tr. 420).

28. James and Sylvia Shaheen have resided in Delaware, Ohio since late 1973, and own their home in Delaware. James Shaheen began in broadcasting in 1956, as an announcer at WJER, Dover, Ohio, and WAND, Canton, Ohio, where he worked until 1958. From 1958-60 he was Program Manager of WAND, and from 1960-62, he was Sports Director of WLEC, Sandusky, Ohio. From 1962-63, he was Program Director of WCMW, Canton, Ohio, and from 1963-65, he was Sales Manager of that station, whose call sign had become WHOF (Canton, Ohio). In 1965, he built, and from 1965-71, was General Manager of WINW, Canton, Ohio. Mr. Shaheen was General Manager of WNBF-AM and WQYT-FM, Binghamton, New York, from 1971-73, and he has been General Manager of WDLR(AM), Delaware, Ohio, since the beginning of 1974 (RDI Ex. 5, p. 3; Tr. 420).

29. James Shaheen's related civic activities and awards in Delaware, Ohio are the following: selected by Delaware Chamber of Commerce as "Outstanding Citizen of the Year" 1985 (most prestigious award in Delaware, with one recipient per year); the award was presented to WDLR itself in 1978, (RDI Ex. 6); Charter Member since 1975, Board Member (for ten of the years between 1975 and 1989) and President (1987-88) of Delaware County Kiwanis Club; General Chairman and the founder of the Little Brown Jug Festival, the community's largest festival (Shaheen was the organizer of the Festival in 1985, and as Chairman since then he has overseen 12 subcommittees and is responsible for fund-raising for the annual September harness race); President of Delaware Chamber of Commerce, 1980, and Board Member, eight years between 1975 and 1989; Chairman, American Lung Association Celebrity Luncheons in Delaware, 1982-84; Board Member and Chairman, Development Committee, Central Ohio Symphony Orchestra, since September 1988; General Chairman, Heart Fund Campaign, 1979; Member, Delaware Development Committee, 1988 to date; Organizer in 1975, and Chairman, Downtown Delaware Business Association, 1975-78; Board Member, Delaware Joint Vocational School Advisory Committee, 1982 to date.

30. He was also Co-Chairman, Delaware City Levy Committee, 1986; Co-Chairman, American Cancer Society Golf Tournament, 1982 to date; Member, Delaware School Music Boosters, 1975-83; Member, Delaware School Athletic Boosters, 1978-85; Chairman, United Way Commercial Division, 1977; Member, Delaware Farm Bureau, 1975-81; Member, Delaware School Levy Committee, 1987; Recipient, Delaware JVS, Community Service Award, 1987; Member, Delaware Branch, Elks Club, 1986 to date; Member, Delaware City-County Joint-Justice Facility Committee, 1975; Co-Chairman, Delaware Joint Vocational School Levy Committee, 1984 and 1988; Member, City Hall Task Force Committee, 1988; Founder, Delaware Wall of Fame, 1988; Community Service Award, Delaware Chamber of Commerce, 1976-77; Delaware Jaycees' Outstanding Service Award, 1976-77; Delaware Branch, American Cancer Society, service awards, 1986, 1987; and Outstanding Contribution Award, 1984, Ohio House of Representatives (for contributions to Delaware, Ohio) (RDI Ex. 5, pp. 3-5; Tr. 420).

31. Shaheen proposes not to allow his civic activities to interfere with his commitment to spend at least 40 hours per week dedicated exclusively to the management of the proposed FM station (RDI Ex. 5, p. 6).

32. As General Manager of the proposed FM station, Shaheen proposes to have overall responsibility for all station operations, including hiring and firing of all management-level personnel, establishment of overall programming and commercial policies, and oversight of all day-to-day operations, and will also be in charge of the station's EEO program. RDI intends to sell its daytime-only AM station in Delaware before the FM station begins operations. In the event that the sale is not consummated by that time, Shaheen will resign his position as General Manager of WDLR(AM) before program tests begin on the FM station and a manager would be hired for the AM station. In that event, Mr. Shaheen would retain overall authority over the AM station until it is divested and would be available on an as-needed basis. Such oversight would average no more than ten hours per week, mostly during evening and weekends, beyond the 40 hours per week Mr. Shaheen will devote to managing the FM station (RDI Ex. 5, pp. 6-7).

33. From 1965-71, Sylvia Shaheen was Promotions Manager of WINW, Canton, Ohio. Ever since 1974, she has worked full-time as WDLR's Traffic and Office Manager. She is involved in all policy and most personnel and operational decisions, and is primarily responsible for the financial operations of the station. Sylvia Shaheen will be full-time station manager of the FM station, managing the station's traffic and administrative departments, generally assisting the General Manager in his oversight of the station and she will be in charge of all station operations in his absence. Ms. Shaheen will be fully involved in establishing all policies and in all decision-making at the station (RDI Ex. 6, pp. 1-2; Tr. 408). If RDI has not sold the AM station by the time the FM station commences operations, Ms. Shaheen will resign her position at the AM station (RDI Ex. 6, p. 2).

34. Sylvia Shaheen's civic activities and awards in the fifteen years she has lived in Delaware, Ohio have included the following: selected by Delaware Chamber of Commerce as "Outstanding Citizen of the Year," 1981; President (1986-88 and President-Elect for 1989) and Founder, Delaware Group Home for Youths (Touchstone) and Board Member, since 1979; Member, Delaware Rotary Club, 1987 to date (one of the first women permitted to join); President, Delaware Altrusa Club, 1981; Member, 1974 to date, and Board Member 1982-87; Board Member, Ohio Wesleyan University Education Department, 1983 to date; Co-Chairperson, Delaware City Levy Committee, 1986; Co-Chairperson, Little Brown Jug Festival Gala Committee, 1988; Member, Delaware School Music Boosters, 1975-85; Member, Delaware School Athletic Boosters, 1978-85; Chairperson, Delaware County Welfare Department, 1982; Chairperson, Delaware Juvenile Court, Volunteers for Youth, 1976; Board Member, Delaware Social Services Agency Board, 1976-82; Member, Delaware County Child Abuse Council, 1975-78; Board Member, Delaware County Welfare Department, 1982-85; Member, Task Force for City Hall facility, 1988 to date; Board Member, Delaware Sheltered Workshop for the Handicapped, 1978-81; and Member, Delaware League of Women Voters, 1975-80. Ms. Shaheen's ongoing civic activities average a total of approximately five hours a week (RDI Ex. 6, pp. 2-3).

35. Carl Shaheen lives in Canton, Ohio, but will move to Delaware, Ohio to become full-time Regional Sales Manager of the proposed FM station. Carl Shaheen will supervise advertising accounts, emphasizing Northern Ohio, Pittsburgh, Detroit, and Cincinnati, and will be involved in establishing sales policies and practices at the FM station and overseeing sales personnel. Mr. Shaheen worked for twenty-eight years in sales for Merrill Lynch, minored in economics, and received specialized training in sales from his former employer. (He also has a law degree.) Neither Carl Shaheen (nor his wife or any of his siblings or in-laws) will remain as paid consultants to WDLR (the AM station) after the FM station goes on the air (RDI Ex. 8; Tr. 385).

36. Charlotte Shaheen lives in Canton, Ohio, and works for General Electric Capital. If RDI is awarded a construction permit for the new FM station in Delaware, she will resign her job and move to Delaware to be full-time Controller of the station, working 40 hours or more per week. Charlotte Shaheen has educational training in accounting and management, and eleven years of accounting experience. As Controller, she will supervise all financial business, including taxes, receivables, payables, payroll, budget allocations, and preparation of monthly statements and balance sheets. She will participate in establishing financial policies as part of the budget allocation process, and will make recommendations participate in decisions about the operation of the station and its impact on cash flow (RDI Ex. 7; Tr. 370).

37. Sadie Shaheen lives in Canton, but will move to Delaware to work at the proposed FM station. She is not currently employed and has no obligations that would prevent her from moving to Delaware and working full-time at the FM station. Sadie Shaheen will work at least 40 hours a week as Community Affairs Director of the FM station. She will establish and maintain relationships with organizations in Delaware and throughout the proposed service area. Sadie Shaheen has been actively involved in local civic activities and groups in Canton, and expects to be able to familiarize herself quickly with similar organizations in Delaware. As Community Affairs Director, she will develop programs for the dissemination of public information and discussions regarding Delaware-area organizations. She will act as the station's liaison with colleges and universities in the area (including Ohio Wesleyan, located in Delaware) and encourage them to use the station to inform the public. She will also share responsibility for establishing station program policies and ensuring the programming is responsive to community needs and interests (RDI Ex. 9; Tr. 391).

38. Marguerite Turk lives in Canton, Ohio. She and her husband own and manage a grocery store, which they will sell if RDI is awarded a construction permit for its proposed FM station. They will move to Delaware before the FM station goes on the air. Marguerite Turk assisted in the community ascertainment of the general public that RDI conducted prior to its acquisition of the AM station, and throughout the past 15 years, she has been an officer and Director, and has made frequent trips to Delaware. Ms. Turk will be full-time Local Sales Manager of the FM station, directly responsible for supervising all local sales, sharing responsibility for hiring and firing and overseeing the sales staff. Ms. Turk will have primary responsibility for training personnel, and will be involved in establishing goals and budgets for the Sales Department (RDI Ex. 10; Tr. 398).

39. Deeb Turk was born in Lebanon, but became a U.S. citizen approximately 25 years ago. He lives in Canton, Ohio, but will move to Delaware, Ohio to work at RDI's proposed FM station at least 40 hours a week, as Program Manager. Mr. Turk will be in charge of seeing that the station's programs deal with the needs of community groups and will oversee religious, ethnic, minority and other non-entertainment programming. He will act as liaison to community groups to ensure that their needs are addressed in the station's programs, and will be one of the managers who will set policies for the station's non-entertainment programming. If Mr. Turk finds that, over time, he can carry out all of his anticipated responsibilities in fewer than 40 hours a week, he will take on additional responsibilities at the station (RDI Ex. 11; Tr. 401).

40. RDI is, and since early 1974 has been, the licensee of daytime-only station WDLR(AM), Delaware, Ohio. If RDI is awarded a construction permit for a new FM station at Delaware, Ohio, RDI will divest its AM station within three years from the commencement date of program test authorization for its proposed FM station. RDI has been operating its daytime-only station in Delaware for 15 years, and its owners have collectively been involved in operating the AM station in excess of 20 hours per week throughout that period. RDI has not received authority to operate at night with 250 or more watts of power (RDI Ex. 2; pp. 1-2; Tr. 419).

41. Except for its AM station which it timely proposed to divest, RDI has no interest in any medium of mass communications or any pending application (other than the FM application that is the subject of this proceeding). Also, other than their interests in RDI, none of its officers, Directors, or shareholders have any media interests, except that James Shaheen has been awarded a construction permit for a low-power television station on Channel 56 at Delaware, Ohio, which he has timely committed to divest (RDI Ex. 2, p. 2; Tr. 419).

42. As stated in RDI's application as originally filed:

> It is planned to install a standby generator for use in the event of a primary power failure. The existing WDLR studio and transmitter building already has a standby power generator so that continued operation in the event of power failure is assured. Space on on the new tower will be offered to civil communications authorities, together with access to the standby power supply thus assuring continued civil communications in the event of emergency.

RDI will have auxiliary generators both at the transmitter and at its FM studio (RDI Ex. 4; Tr. 420).

Adams Broadcasting Corporation

43. Adams is an Ohio corporation which has authorized and issued 200 shares of voting stock and 800 shares of non-voting stock (Adams Ex. 1; Tr. 445). The stock was issued in June 1987 (Adams Ex. 1; Tr. 500). JoAnne Adams, who is President, Treasurer, Secretary and proposes to be its sole voting shareholder (Adams Ex. 1), did not pay for her stock until November 6, 1987 (RDI Ex. 19, p. 2; Tr. 521), three months after Adams' application was accepted for tender (on August 4, 1987, official notice granted), Ms. Adams first sought to pay for her stock in June 1987); her check was returned by the bank for

insufficient funds (Tr. 502). She then deposited sufficient sums to cover the cost of the stock on July 14, 1987; the total amount of that deposit was only $100 (RDI Ex. 21; Tr. 511, 551). The next check that she made out to the corporation was $200 check (the par value of the stock) in November, 1987 (RDI Ex. 19; Tr. 516). Adams states that was not the check that was for the purchase of her stock (Tr. 516); she said that she had made out a $200 check for her stock (*Id.*) and she provided no evidence of any other payment between June and September 1987 other than the $100 deposit in mid-July 1987 (Tr. 553). Adams has no stock subscription agreements (Tr. 526, 631).

44. G.T. Leasing, Inc. (GT), a Michigan corporation, owns all of Adams' non-voting stock (RDI Ex. 18; Adams Ex. 1; Tr. 482); GT in turn is owned 50/50 by its two officers and Directors, Gregory Theokas and Thomas Beauvais (RDI Ex. 18; Tr. 614-15). GT leases land and broadcasting equipment, including a building and tower site that it leases to the station (WKQZ(FM)) owned by its affiliated company (Tr. 632).

45. JoAnne Adams has the option to purchase the non-voting stock in Adams, held by GT Leasing, for a period of three years after Adams receives a construction permit (Adams Ex. 1; RDI Ex. 18). This option was an arrangement that JoAnne Adams negotiated (Tr. 498). Neither GT Leasing nor its officers, Directors or shareholders have any right to acquire the interest JoAnne Adams has in Adams (Adams Ex. 1).

Diversification (Adams)

46. Neither Adams itself, nor JoAnne Adams as sole owner of voting stock, has any ownership interest in any other media of mass communications. Adams did not list the interests of the owners of the non-voting stockholders urging their interest as non-cognizable, citing *Daytona Broadcasting Company, Inc.*, 103 FCC 2d 931, 934 (1986). JoAnne Adams pledges to terminate her position with WBBY if Adams' application is granted (Adams Ex. 2). RDI challenges the non-cognizable attributes claimed by Adams arguing that "every matter of any consequence to Adams' application and proposed station was decided among the voting and derivative non-voting shareholders . . . the non-voting shareholder is in the actual business of leasing land and broadcasting equipment and its affiliated company owns and operates a radio station." In Reply, Adams rejects this contention stating "agreeing to supply funds is the essence of the role of passive investor," in any event RDI has supplied no probative evidence to support its contentions. The findings *infra* support Adams thesis (*See* Fdgs. 55 *et seq.*).

Integration (Adams)

47. Adams proposes the full-time integration (i.e., at least 40 hours per week), of JoAnne Adams into the management of the proposed station (Adams Ex. 3). Ms. Adams will have primary responsibility for the station's sales, programming, general administration and the preparation of budgets and projections. She will also be responsible for implementing the station's equal opportunity program (Adams Ex. 3).

48. Ms. Adams has been a resident of Delaware, Ohio since August of 1987 (Adams Ex. 4). She plans to continue to reside in Delaware (Adams Ex. 4) and act as General Manager of the proposed station for the foreseeable future (Adams Ex. 3). JoAnne Adams is a female (Adams Ex. 4).

49. Ms. Adams currently is National Sales Manager of FM Station WBBY, Westerville, Ohio. She will resign this employment if Adams' application is granted (Adams Ex. 2).

50. Ms. Adams has been employed either at broadcast stations or in fields of endeavor directly related to broadcasting, such as a media buyer, since 1957. Since January 19, 1987, Ms. Adams has been National Sales Manager and Local Sales Representative for FM Station WBBY, Westerville. Between 1982 and 1983, Ms. Adams was Vice President and National Sales Manager for the Creative Factor (producers of radio programming). Between 1979 and 1981, Ms. Adams was Western Regional Manager for RKO Radio Network (Adams Ex. 4).

51. Between 1969 and 1979, Ms. Adams was a Sales Representative, Western Regional Manager--Radio and Director of Marketing for the Western Region for KATZ Radio/TV. Between 1963 and 1969, Ms. Adams was a broadcast advertising buyer for the following advertising agencies: Campbell-Ewald, Detroit, Michigan; McCann-Erickson, Detroit, Michigan; Young & Rubicam, Detroit, Michigan and Ms. Adams was Director of National Sales Continuity and Traffic Director for WCAR(AM), Detroit, Michigan from 1957-1963 (Adams Ex. 4).

52. Ms. Adams has been involved in the following community organizations in Delaware: Help Anonymous--an organization dedicated to crisis intervention, information and referral services serving Delaware and Morrow counties. She began training in September 1987. Training includes learning intervention techniques and understanding community resources. Ms. Adams completed 50 hours of training in nine weeks and passed written and oral exams to become a paraprofessional crisis intervention counselor. Ms. Adams works four-hour shifts every week at Help Anonymous, in Delaware, Ohio. Training and in-service updates (1 or 2 per month) include: suicide, rape, child abuse, grief and loss, homelessness and mental health. She is there to help anyone who calls or comes in for assistance. She has joined Help Anonymous' speaker bureau and will devote time (in addition to regular volunteer work) to make representations in Help Anonymous' behalf on various subjects. Her time devoted monthly is approximately 20 hours (Adams Ex. 4).

53. Business and Professional Women (Delaware). Ms. Adams has been a member (The Voice of Working Women) since 1988. The objective is to elevate the standards of women in business and in the professions. The group meets once per month in Delaware (Adams Ex. 4).

54. United Way-Delaware. In 1987, Ms. Adams served as public relations volunteer, during which time she assisted in various programs, contacted local schools for participation in public relations events and assisted in fund raising (Adams Ex. 4).

55. Ms. Adams first learned about the availability of the FM assignment to Delaware, Ohio from a friend (Tr. 464). At that time, she had only six weeks to file the application (Tr. 466). She called a friend of 20 years, Thomas Beauvais, asking how to proceed and he told her, first get an attorney (Tr. 468). Mr. Beauvais gave her several names, including that of the Washington counsel he employs (Tr. 468). Her FCC counsel told her to retain the services of a consulting engineer, and gave her Mr.

Munn's name (Tr. 470). FCC counsel advised Ms. Adams there were different ways of financing an FM station including establishing a corporation with voting and non-voting stockholders (Tr. 467-468).

56. After she talked to FCC counsel, knowing that she had little time to arrange for bank financing, Ms. Adams asked Tom Beauvais if he would be interested in investing in Adams (Tr. 475). He told her he might be but would first have to talked with Mr. Theokas (Tr. 475). After a meeting, Mr. Beauvais and Mr. Theokas, sole stockholders of GT Leasing, agreed to enter into a shareholder agreement with JoAnne Adams (Tr. 480-481). Under the terms of this agreement, up until the time that Adams receives a construction permit, all of the capital costs of prosecuting the application are split on an 80/20 basis in direct ratio to the stockholders' equity (RDI Ex. 18). After receipt of the permit, GT Leasing is to lend to Adams the funds necessary to construct the station and operate it for three months (RDI Ex. 18). After receipt of the construction permit and after repayment of the construction and operation loan, Ms. Adams has been given an option for three years to purchase GT Leasing's stock in Adams for a multiple of five times capital equity during the first year, six times the second and seven times the final year (RDI Ex. 18). This option was something Ms. Adams wanted because she believed that after she received the permit she would have time to get a bank loan and "buy them out" (Tr. 496).

ULTIMATE FINDINGS AND CONCLUSIONS

The Site Advantage Issue

57. Citing *Alabama Citizens for Responsive Public Television*, 69 FCC 2d 1061, 1071, (1978), Adams asserts were "what RDI did in trying to preclude her from securing a transmitter site . . . not such a serious matter, the series of events might be considered to be virtually a comedy of errors." It is, indeed, a serious matter when the related events in evidence are recited. RDI had a transmitter site, which it could lease for $175 a month for 50 years. That site had FAA clearance. Lease of the site was within the proposed RDI's estimate of costs of construction and operation. The purchase of the Gosnell site for $37,368 would have added a sum much beyond that which RDI had to construct and operate the proposed station (Adams Ex. 8).

58. Though it had a suitable antenna site, RDI changed its site. When James Shaheen secured a copy of the Adams' application, he apparently knew that something was wrong because the site description described roads that did not intersect. He had his engineer analyze Adams' application and found that the site specified in Adams' application was the Solove site. RDI then had their local attorney and his real estate partner contact Jesse Smith, who was listed in the Adams' application as the person that could confirm Adams' certification that it had reasonable assurance of site availability. They asked Smith about the property that Smith had to sell, as a real estate broker, on Curve Road, i.e., the Gosnell site. James Shaheen went to see Mr. Smith on August 20, 1987 and determined from him that it was the Gosnell site and not the Solove site that Mr. Smith had shown to Adams. He also found out that Adams did not have an exclusive option to purchase the property.

59. James Shaheen on that same day executed an agreement giving RDI an exclusive option to acquire the Gosnell site. With such an exclusive option, even if Adams had recognized its engineer's error and tried to amend its engineering to specify the Gosnell site, it would have been precluded from doing so, based on the disposition in *South Florida Broadcasting Company, Inc.*, 99 FCC 2d 840, 847, Rev. Bd. (1984), that an applicant cannot claim reasonable assurance of site availability for a site on which his opposing applicant has an exclusive option. Consequently, Adams, under these circumstances, would be lacking reasonable assurance.

60. Facing the impending September 1, 1987 cutoff date for perfecting amendments, on August 25, 1987, James Shaheen executed an amendment to RDI's application specifying the Gosnell site, even though he did not sign a final counteroffer on the Gosnell site until August 31, 1987 and the owner of the property did not accept that counteroffer until September 5, 1987 (Adams Ex. 5L). Hence, if Adams had tried to correct the engineer's error in specifying the wrong site, as result of his misinterpreting plat maps, by amending the engineering to specify the Gosnell site, RDI would have Adams on "the horns of a dilemma." RDI knew that Adams had no right to use the Solove site, and how RDI had an exclusive option for the Gosnell site. Unfortunately, for RDI, Adams was ignorant of its engineer's error and JoAnne Adams did not discover the error until late April early May of 1988 when she talked to Jesse Smith. In the interim, since the FAA had denied use of the Gosnell site as constituting an air hazard, RDI no longer needed to tie up this property with the option and simply amended its application to the original Jumper site. This was the site RDI always intended to use, as Adams argues.

61. Again, Adams urges not without fair persuasion, "had James Shaheen been candid in admitting that RDI had attempted to prevent Adams from using the Gosnell site, it might have been a less serious matter than the "blatantly false" defenses that RDI raised that Jesse Smith never told James Shaheen that the Gosnell site was the property he had shown to JoAnne Adams and that RDI had no intent to deprive Adams of a transmitter site because they thought Adams had a site on the Solove property. Adams also accurately observes candorless testimony, when the lack of candor occurs, "before the Judge's own eyes," is disqualifying and specific notice to an applicant that he must testify truthfully is superfluous, *Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 719 (Rev. Bd. 1983).

62. Adding to this, Adams notes, "six times in this proceeding James Shaheen either denied or waffled in his testimony that as a result of his negotiations with Jesse Smith he had any understanding that JoAnne or anyone from Adams Broadcasting was planning to buy the Gosnell site. Shaheen's testimony borders on an insult to the intelligence of the forum, because in August of 1987, James Shaheen prepared an affidavit for Mr. Smith to execute in which Mr. Smith stated the he showed a representative of Adams the Gosnell site (Adams Ex. 5E)."

63. Shaheen further personally prepared two maps in which he located the Gosnell site as being the property Jesse Smith told him he had shown Adams and marked also on the same maps the location of the Solove site as being the one specified in the Adams application. "In view of this 1987 evidence that Mr. Shaheen personally

prepared, his 1989 repeated testimony that he did not know the Gosnell site was the property Mr. Smith had shown to Adams is ludicrous," Adams adds. On three occasions, RDI filed pleadings in which it requested a site availability issue against Adams, urging that Jesse Smith, who had been listed in Adams' application as the person upon whom Adams relied for reasonable assurance, had shown her the Gosnell site and not the Solove site, which as specified in her application.

64. Also, RDI's contention they would not try to deprive Adams of a site and were very careful to determine that she had nothing to do with the Gosnell site "is equally ludicrous," Adams observes. James Shaheen contacted a member of the Solove family and determined that they had no arrangements with anyone to place a radio tower on their property. RDI used this knowledge when James Shaheen prepared an affidavit in August of 1987. RDI then used this affidavit as a basis for a Motion to Enlarge Issues based on the premise that Adams did not have reasonable assurance of site availability of the Solove site when Adams filed its application. Thus, it should follow that if RDI truly believed Adams did not have a site problem, then RDI's Motion to Enlarge Issues requesting such an issue makes little sense, if not nonsense.

65. At great length RDI defends its conduct respecting the Adams' antenna site efforts stating first that it "has never attempted in anyway to secure that ("Solove") site or prevent Adams from using it"; that *Alabama Citizens*, 69 FCC 2d 1061 (1978), cited by Adams, is "wholly inapposite, in that there the incumbent, a non-commercial licensee, could not extend site leases "for the sole purpose of frustrating the application of a competitor"; it does not stand for, says RDI, that a new applicant for new facilities may not obtain a site on an exclusive basis; irrespective of which other sites may be available to competitors; that here RDI determined that Adams did not have reasonable assurance of the site it specified; and that having been told Adams had not negotiated for the site shown by Jesse Smith, and by him that Adams "was not seriously interested in the site (but at most had only wanted to know if the land was available to a qualified purchaser) and recognizing that Adams did not specify that site its FCC application," RDI negotiated to purchase the "Smith-shown Gosnell site for its own legitimate purposes." Lastly, RDI urges that the Gosnell site RDI agreed to purchase under stated conditions, itself proved to be unacceptable to the FAA for such use; that other sites were and are available; and that its efforts to secure the Gosnell site "were neither anticompetitive nor contrary to the Commission's policies or precedent."

66. Under the evidence, particularly the testimony and affidavit of Jesse Smith, that argument of "policies or precedent" appears to repeat RDI's shop-worn thesis, as if unconscionable conduct needs precedent to sustain its opprobrium; surely, whatever posterity may assay respecting our current society, hopefully, it will not irresistibly embrace that nadir.

67. The evidence is persuasive that at all times James Shaheen knew that there was a problem with Adams' application because Adams had specified Jesse Smith as the person to be contacted, not Richard Solove, and the property that Smith had shown Adams was the Gosnell site and not the Solove property. Further, he determined that Solove had no arrangement with Adams.

68. The evidence on this issue is convincing and it must be concluded that RDI attempted to deprive Adams of the use of the Gosnell site so that Adams could not correct its engineer's error by modifying the application to specify the Gosnell site prior to the perfecting amendment date. What, in sum, has occurred here amounts to nothing less than chicanery on the part of RDI and its principal. And, as an earlier occasion noted, when the thesis in defense was propounded by RDI that even should it be found that RDI committed the conduct of purposeful deprivation of the Adams' site, no Commission precedent proscribed such conduct, that defense again must summarily be rejected.

69. For as the Commission has emphasized it "will not tolerate abuse in any context" by applicants. *Cf. Memorandum Opinion and Order*, FCC 88M-4430, released, December 30, 1988, para. 7 *et. seq.* Here that "abuse" under the evidence is reprehensible and, as such, on that score alone, RDI must be found as greatly wanting in qualifications to be a Commission licensee, as such, it is concluded that RDI is disqualified.

70. Recognizing that this disposition may not be the final word, if only for the sake of the fullest record and possible appellate concerns, those matters addressed in the evidence to the comparative attributes of the parties will be set out hereafter.

Standard Comparative Factors (RDI)

Best Practicable Service - Integration

71. RDI proposes to integrate 100% of its ownership into full-time management level positions at its proposed station. In its calculations as derived from *Omaha TV 15, Inc.*, 4 FCC Rcd 730 (1988), RDI would be entitled to "10,000 HHI integration points (100 percent of ownership times 40/40, all squared)." This argument is properly rejected by Adams noting that *Omaha TV* formula was simply adopted to distinguish the difference between applicants some of whose parties propose part-time integration, a matter not involved here. James Shaheen and his wife Sylvia own 60% of RDI's corporate stocks while the minority shareholders hold the remaining 40%. James Shaheen and Sylvia Shaheen have been residents of Delaware service 1973. Both of them also have considerable broadcast experience, 33 years for Mr. Shaheen, as General Manager of radio stations since 1965, and over 20 years of managerial experience for Mrs. Shaheen as General Manager of radio stations since 1965 and over 20 years of managerial experience for Mrs. Shaheen. The other five owners of RDI have been owners of their family's AM station since 1974, and have been involved in running WDLR(AM) since that time as Directors, consultants, and some as officers. Those five individuals, representing 40 percent of RDI's ownership and control, propose to move from Canton, Ohio to Delaware to work at the proposed station.

72. Four of RDI's seven shareholders, representing 53-1/3 percent of the ownership, are female, and all but Sylvia Shaheen (or a total of 73-1/3 percent) are of Lebanese and/or Syrian descent. RDI acknowledging that persons of that or those descents are not presently afforded enhancement status as recognized minorities proposes that this agency now do so and footnotes certain precedent implicitly suggesting support of its thesis, among which are *Non-Discrimination Employment Practices of Broadcast Licenses*, 13 FCC 2d 760, 770 (1968);

FCC Form 395 and Instructions, 66 FCC 2d 955, 959, 960 (1979); *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 980, n. 8 (1985); *Random Selection/Cuttery Systems*, 102 FCC 2d 1401, 1407-08 (1985); and *St. Francis College* v. *Al - Khaz raji*, 95 L.Ed. 2d 582 (1987). It suffices to note at the point and on that RDI suggestion, that the Commission itself as the sole policy maker within this agency has not found fit to expand or interpret its policy extant to include persons of the descent RDI proposes, whatever the merits of that proposal. *Cf.* cited n. 8, 68 FCC 2d 979-980. Hence, RDI's proposal may not be recognized here. The attributes of female participation and enhancement potential are, of course, different matters. *See also* OMB Policy Directive No. 15 attached to Congress in Conference Report 97-765, released August 19, 1982.

73. For 15 years, RDI has been the licenses of daytime-only AM station WDLR(AM), in Delaware, Ohio. RDI appears to qualify for the daytimer preference established in *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignment*, 101 FCC 2d 638, 643-47 (1985) and the reconsideration/clarification *MO & O* in that Docket _____ FCC _____, 59 RR 2d 1221, 1229 (1986), *aff'd sub nom. National Black Media Coalition, et al.* v. *FCC*, 822 F.2d 277 (2d Cir. 1987). RDI also appear to satisfy all of the relevant criteria. James and Sylvia Shaheen have each worked in excess of 20 hours per week at the AM station for 15 years (in the aggregate, in excess of 80 hours per week), the AM licensee is the FM applicant; the AM station is in the same community as the FM station would serve; the station has been owned continuously for 15 years. *Implementation of BC Docket No. 80-90*, *supra*, 101 FCC 2d at 639, 643, 645.

74. Adams' claim of 100% integration credit based on the proposal of JoAnne Adams to work at the station "is illusory," RDI states, and suggests Adams warrants no integration credit.

75. Yet, rejecting RDI's assertions, Adams on the other hand, proposes the full-time 100% integration of JoAnne Adams. It is JoAnne Adams who put the entire Adams proposal together, and it is JoAnne Adams alone that can buy out the non-voting stockholders. Despite depositions and extensive examination of Adams witnesses at the hearing, Adams urges RDI failed to show that the non-voting stockholders had participated in Adams in any way other than to the extent of executing a stockholder's agreement by which they agreed to provide certain funds. Because their financial risk in participating in Adams is small, consisting of 80% of the cost of prosecuting the application and the rewards are great, in that JoAnne Adams must pay them 5, 6 or 7 times that sum to buy them out or they would retain 80% of the equity in a presumably valuable facility, Adams submits.

76. Conceding enhancement credits for local residency, civic participation, and cognizable female preference to RDI, Adams nevertheless, claims a substantial preference over RDI. "While James and Sylvia Shaheen of RDI have been long-time residents of Delaware, they only represent 60% of RDI's ownership, and in comparing 60% to 100%, which is the difference between RDI's and Adams' proposals, Adams must receive a substantial preference in these categories," Adams states. RDI's daytimer preference is only enough to slightly lower Adams' enhancement credits from substantial to moderate, Adams notes. "Adams' 100% long-tract record of being involved in broadcasting and broadcast-related enterprises, must be preferred in this regard," Adams concludes.

77. "Her HHI is accordingly nonexistent, or, under the rules of mathematics, imaginary (no ownership times no creditable hours to be worked, all squared); zero multiplied by itself is an imaginary number, as is the square of that computation," is RDI's calculation concerning Adams. As noted earlier, that "HHI" formula is not of concern here; Adams has been credited with 100% full-time integration and RDI 60%.

78. RDI argues, FCC precedent establishes that integration, to be worthy of being credited, must be proposed on a permanent basis, citing *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 n. 6 (1965) and others. "Here, Adams has twice stated that she will abandon her integration commitment if 'something else comes along' or when 'something else happens'." Adams' proposal is not even contingent on one specific event, as was the case in *Houston Family*, *supra;* instead, whenever "something else" occurs, Adams' intention is to cease working at the proposed station. Such a transient proposal does not warrant any credit, RDI states.

79. Indeed, RDI adds, "Adams does not deserve integration credit because she had neither paid for her stock nor signed a stock subscription agreement by the date thirty days after the acceptance for tender of her application," citing again *Houston Family*, *supra*, at 667, where it is urged signed stock subscription agreements are the minimum price for admission to integration credit in the absence of purchased stock; less than that, as here, is the equivalent of an option which warrants no integration credit. To the contrary, the evidence fully sustains 100% full-time integration credit to Adams. *Cf. Coast TV*, FCC 89-47, released February 23, 1989 and *see:* Stipulation at Tr. 523.

80. In summary and review of the evidence underlying the added issue affecting RDI, though implicit, the evidence fairly leaps out that RDI, through its principals who set down, virtually boast, of their long presence as broadcasters in the community of license with a host of activities in virtually every attribute of civic activity and civic leadership participation could have been so detached and unknowing of the surrounding community's land-space availability for the location of a suitable transmitter site, once their AM site failed to meet the FAA requirements, is less than convincing. Their movements from one site to another, from a suitable FAA acceptable site to the Gosnell site shown earlier by Jesse Smith to Adams, their capitalizing with foreknowledge of Adams' errant, perhaps inept, selection of the Solove site are hardly conducive to the notion of innocent conduct, and Adams is not far off target in characterizing that conduct as "virtually insulting to the intelligence of the forum."

81. RDI undoing is totally self-inflicted. Rather than overcoming on its own attributes successful challenge to this quest for an FM franchise by Adams, a virtual outsider and newcomer and possessed with almost all the governing criteria of enhancement attaching to an FM applicant, indeed, with a 60% full-time integration of ownership and management proposal further enhanced by female management presence, it sought a lower level of pursuit by attempting outright disqualification of its opponent at the outset by precluding that opponent from realizing a basic qualifying requirement, a suitable antenna site.

82. Both parties disparage each's integration proposal, a not uncommon tactic of currency; a matter precipitated or, perhaps better, permitted under the latter-day provisions of the Uniform Limited Partnership Legislation extant and the passive investor notions of private corporate enterprise. Yet, it is not an unauthorized disclosure of a High State Secret to acknowledge that by-and-large the fashioning of the most alluring comparative proposals among contestants for public franchise in a broadcast facility is usually under the tutelage of lawyers. This is not to be denigrated; rather this is the commonplace, accepted, if not suggested, under the prevailing system.

83. Again, the evidence of record sustains the persuasion that Adams would warrant 100% credit for its proposed full-time integration of ownership and management and RDI at full-time 60%. Yet, RDI denigrates the efficacy of Adams' ownership proposal as clouded by the financial backing and the pervasive presence of the non-voting shareholders, indeed, RDI describes "its purported voting/non-voting structure is a sham" and adds "every matter of any consequence to Adams' application and proposed station was decided among the voting and derivative non-voting shareholders . . ."; that "based on the totality of the circumstances, such an applicant is a sham and cannot receive any integration credit," citing *Hispanic Owners, Inc.*, 99 FCC 2d 1180, 1190-91 (Rev. Bd. 1984) and others. Suffice to note as Adams argues, this is little more than speculation and surmise citing apposite *62 Broadcast, Inc.*, FCC 89R-4, released February 16, 1989 (Rev. Bd.) at para. 33 and RDI Ex. 18.

84. Despite that disparagement, nothing in the evidence, save permissible and reasonable involvement in the events and circumstances attending preparation and pursuit of the Adams' application by the non-voting shareholder even the terms and reach of their Shareholder Agreement, warrants other finding save a true passivity and insulation of those non-voting shareholders in the anticipated management of the Adams' proposed station. Accordingly, Adams has been accredited 100% integration credit. In like manner, because, principally, of the minimal roles and lack of management/broadcast experience of RDI minority shareholders, the evidence supports fairly the proposition that the proposed office and positions of the minority shareholders in conjunction with those of the majority shareholders, suggest but 60% integration credit for RDI.

85. In a collateral matter noted by RDI, the purported "covenant not to compete" with Station WBBY, Westerville, Ohio by Adams, it may simply be addressed noting that "no formal contract" in that matter exists and other elements of duration and geographical reach are as well absent from the evidence, not to mention the fact that that Station's renewal of license has since been denied (104 FCC 2d 572 (Rev. Bd. 1986)).

86. The persuasive evidence reflecting those cognizable attributes associated with the "Best Practicable Service" beyond integration will also be addressed. Local residence, participation in civic activities in the community, a part of owner's local residence, previous broadcast experience and other enhancement factors such as female and minority ownership are the guiding elements underlying comparative choice in this respect. (*Cf. Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) and prevailing precedent derived therefrom).

87. RDI concedes, in the matter of female enhancement "Adams does have the edge on female status 100 percent versus 53-1/3 percent (although RDI has Adams outnumbered four women to one)." (Will comparative nuance never cease?) But terming Adams' broadcast experience "antiquated," her local residence virtually non-existent, coming right on the heels of acceptance of her applications, acceptance for filing and little or no involvement in civic activities in Delaware prior to her filing or "prior to the 'B' cutoff date," save for a few hours a week at a crisis intervention center, RDI concludes Adams is greatly inferior to it in these important comparative attributes. However, the evidence is kinder to Adams, her broadcast experience is cognizable over the years 1957 to present, in a number of broadcast related capacities, as media buyer, national and local sales manager and regional manager for a radio network. Adams does falter in comparison in other aspects. Her local residence is recent, as of August 1987, and, while cognizable, her civic activities in crisis intervention and related social concerns are, too, fairly recent, September 1987, likewise and her activity in business and professional women's organization, 1988.

88. Having concluded that, RDI, its thin claim for minority enhancement (Lebanese/Syrian/Arab) being disallowed (*Cf. OMB Policy Directive No. 15*, recited in Adams, *Memorandum Of Law*, filed January 31, 1989 in this proceeding, nevertheless, fares better on those criteria of "primary importance" (*Policy Statement, supra* at 396), namely long local residence in the community of license, versus brief or future residence by Adams, plus greater and more intimately connected broadcast experience; added to the RDI Delaware persuasive comparative attributes, is the claimed "daytimer preference," which may not "overwhelmingly" outweigh Adams broadcast experience, as urged by RDI, but it otherwise clearly does in a fair reading of *Implementation of Docket 80-90*, 101 FCC 2d 638, 645 (1985); but even that does not overcome Adams superior integration posture of 100% versus RDI 60%. Equally, as argued by RDI, "[f]emale status and civic participation are less important than daytimer preference or local residence and more important than broadcast experience," citing *Implementation of BC Docket, Ibid*, n. 12; albeit, that minority ownership would equate with local residence, a matter not concluded here respecting either applicant. In a word, Adams' 100% integration, female enhancement and cognizable broadcast experience moderately outweigh RDI's 60% integration, local residence, "daytimer preference" and broadcast experience.

89. RDI might have fared better in this proceeding, but for less than muted obstinacy that it had worked no wrong in the matter of obstructing Adams' rightful quest for and acquisition of a suitable antenna site--a matter, at least at one time, RDI espoused the dark thesis, that even if it had done so, lacking pronounced Commission policy or precedent on occasion little or no consequence. For that grave miscalculation and misconception, tantamount to tortious malfeasance, it cannot win the day on that score alone.

Accordingly, a fair and just resolution under the evidence of record, compels the conclusion that the Adams Broadcasting Corporation application for the captioned facilities at Delaware, Ohio, must be AND IS HEREBY GRANTED; that being so, the application of Radio Delaware, Inc. for those same facilities IS DENIED.[1]

IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

James F. Tierney
Deputy Chief Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d) (47 CFR 1.276(d)).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-115

In re Application of

GOLDEN RULE ORGANIZATION WORKSHOP, INC. BPED-861229MB

Educational FM Broadcast Station,
to Operate on Channel 216A at
Galax, Virginia

Appearances

Julian P. Ferret on behalf of Golden Rule Organization Workshop, Inc.; and *James W. Shook* on behalf of the Chief, Mass Media Bureau.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: July 7, 1989; Released: July 14, 1989

1. On June 21, 1989, Golden Rule Organization Workshop, Inc. (Golden Rule), the sole remaining applicant in this case,[1] filed a "Motion for Leave to Amend and for Summary Decision." The Mass Media Bureau filed favorable consolidated comments on June 30, 1989.

FINDINGS OF FACT

2. In his Hearing Designation Order, the Assistant Chief, Audio Services Division directed Golden Rule to amend their application in two respects. First, he ordered Golden Rule to verify the tower height of their proposed antenna site. Secondly, he told them to locate more precisely their potential interference contour in relation to that of WVVA, Channel 6, Bluefield, Virginia. On this second point the Assistant Chief called for the actual field strengths of the two signals, and the population affected by any such interference. *See* 54 F.R. 22948 published May 30, 1989, at paras. 6, 7, 15, and 16.

3. Golden Rules' amendment addresses the Chief's concerns. First they have verified that the proposed tower site's height is 150 feet above ground level. Secondly, they have depicted Golden Rules' potential interference to Station WVVA-TV's signal pursuant to 47 CFR 73.525. The population affected would be 12,718 persons.

4. However, all the potentially affected area lies outside of WVVA-TV's Area of Dominant Influence (ADI), outside of WVVA-TV's Grade A field strength contour, and within the predicted city grade contour of Station WXII(TV), Winston Salem, North Carolina. Both WVVA-TV and WXII-TV are NBC network affiliates. So, under 47 CFR 73.525(e)(3)(iii), the number of persons potentially affected is zero. Thus, Golden Rule's proposal meets 47 CFR 73.3525(c)'s requirement that no more than 3,000 people may be located within the potential interference area. Under these circumstances good cause exists for amending and Golden Rules' amendment will be accepted.

CONCLUSIONS OF LAW

5. Since the amendment meets all the Assistant Chief's concerns, and since Golden Rule is the sole remaining applicant, they are qualified to construct and operate as proposed. *See* 54 F.R. 22948 *supra.*, at para. 11. Their application will be granted.

SO the "Motion for Leave to Amend and For Summary Decision" that Golden Rule Organization Workshop, Inc., filed on June 21, 1989 IS GRANTED;

The accompanying amendment IS ACCEPTED; and

Unless an appeal is taken from this Summary Decision or the Commission reviews it on their own motion, Golden Rule Organization Workshop, Inc.'s application (BPED 861229MB) as amended, IS GRANTED;[2] and

This proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] *See* FCC 89M-1729 released June 26, 1989.

[2] If exceptions aren't filed within 30 days, and the Commission doesn't review the case on their own motion, this Summary Decision will become effective 50 days after its public release.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Editorial Amendment of Parts 90
and 94 of the Commission's Rules

ORDER

Adopted: June 29, 1989; Released: July 14, 1989

By the Chief, Private Radio Bureau:

1. This *Order* amends Parts 90 and 94 of the Commission's Rules, 47 C.F.R. §§ 90.1-90.657 and 94.1-94.199, governing the Private Land Mobile Radio Services and the Private Operational-Fixed Microwave Services, respectively. These rule amendments correct typographical errors and omissions, remove references to superceded rules, conform these rules to other rules and revise wording to clarify the affected sections. Because these rule amendments are non-substantive, the notice and comment provisions as well as the effective date requirements of the Administrative Procedure Act are inapplicable.

2. Because a *Notice of Proposed Rule Making* is not required, the Regulatory Flexibility Act, P.L. 93-354, does not apply.

3. Authority for this action is contained in Sections 4(i), 5(c)(1) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(c)(1) and 303(r), and by Section 0.331(a)(1) of the Commission's Rules, 47 C.F.R. § 0.331(a)(1).

4. In view of the above IT IS ORDERED that Parts 90 and 94 ARE AMENDED as set forth in the Appendix below.

5. IT IS FURTHER ORDERED that, because these amendments clarify existing rules, this *Order* is effective immediately upon adoption. *See* 5 U.S.C. §553(d).

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

APPENDIX

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 90 PRIVATE LAND MOBILE RADIO SERVICES

The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

1. Section 90.7 is corrected by changing the first word of the definition of average terrain from "Tha" to "The".

2. Section 90.19(d) is corrected by removing the first 154.650 MHz frequency listing and its accompanying class of station notation from the frequency table for Police Radio Service, to read as follows:

§ 90.19 Police Radio Service.

* * * * *

(d) * * *

Police Radio Service Frequency Table

Frequency or Band	Class of station(s)	Limitations
* * * * *		
150-170	Base or mobile	26
154.650	Mobile	
154.665	Base or Mobile	12
154.680	do	12
* * * * *		

3. Section 90.19(f)(5)(ii) is corrected by changing "460.5625-460.5125 MHz" to "460.0125-460.5125 MHz", and by changing "465.0125-460.5125 MHz" to "465.0125-465.5125 MHz" in the frequency table, to read as follows:

§ 90.19 Police Radio Service.

* * * * *

(f) * * *

(5) * * *

(ii) * * * * *

458.0125-458.9875 MHz
460.0125-460.5125 MHz
460.5625-460.6375 MHz
462.9375-462.9875 MHz
465.0125-465.5125 MHz
465.5625-465.6375 MHz

* * * * *

4. Section 90.65(d)(4) is corrected by changing the word "or" to "of".

5. In Section 90.75(c)(25)(viii), the table listing city and airport and the reference coordinates is corrected as follows: For Albuquerque, NM, by changing the symbol

following the longitude from the lower case Greek letter theta to "W"; for Fort Worth, TX, by changing the longitude from "97^0 21' 44" W" to "97^0 21' 41" W"; for Indianapolis, IN, by changing the latitude from "39^0 43' 28" N" to "39^0 43' 32" N" and the longitude from "86^0 16' 60" W" to "86^0 17' 02" W"; for Kahului, HI, by changing the longitude from "156^0 25' 60" W" to "156^0 25' 59" W"; for Pittsburgh, PA, Allegheny County, by changing the latitude from "40^0 21' 17" N" to "40^0 21' 16" N"; for Springfield, MA, Barnes Municipal, by changing the longitude from "72^0 42' 58" N" to "72^0 42' 58" W"; and for Wichita, KS, by changing the latitude from "37^0 38' 06" N" to "37^0 39' 00" N".

6. Section 90.79(c) is corrected by changing the word "indicated" to "indicates".

7. Section 90.89(a)(4) is corrected by inserting a comma after the word "transportation".

8. Section 90.93(b) is corrected by removing the asterisk in the "Limitations" column of the frequency table, for the frequency 152.270 MHz.

9. Section 90.95(c) is corrected by changing the frequency "452.55o" MHz to "452.550" MHz.

10. Section 90.125(a) is corrected by removing the asterisks from the first sentence.

11. Section 90.129(i) is corrected by changing the phrase "Subparts M and S" to "Subpart S".

12. Section 90.135 is corrected by changing the postal area code (zip code) from "17325" to "17326" wherever it appears.

13. Section 90.157 (a) is corrected by changing the postal area code (zip code) from "17325" to "17326".

14. Section 90.177 (d)(1) is amended by changing the stated value of the characteristic impedance of free space from 120 ohms to the correct value of 120 times pi, or 377, ohms. The phrase "(-65.8 dBW/m^2 power flux density assuming a free space characteristic impedance of 120 ohms)" is changed to "(-65.8 dBW/m^2 power flux density assuming a free space characteristic impedance of 120 times pi, or 377, ohms)".

15. Section 90.179 is corrected by changing the last word of paragraph (c) from "license" to "licensee", and by changing "listed" to "list" in the second sentence of paragraph (e).

16. Section 90.203(b)(5) is corrected by changing "(old Part 921)" to "(old Part 91)".

17. In Section 90.205(b), the table is corrected by changing the references to footnote 6, in row 10, and footnote 7, in row 12, from standard script to superscript. The reference to note 11, in row 3, is corrected by moving it from the column marked "Frequency range (megahertz)" to the column marked "Maximum output power". Note 5 is corrected by changing the last letter of the note from "P" to "Q". Note 6 is corrected by removing the reference to Subpart M.

18. Section 90.207 is corrected by changing the word "authorizd" in paragraph (c) to "authorized".

19. Section 90.209 is amended to clarify and correct it. In paragraph (c)(2)(iii), change the phrase "at least 43 plus 10 log (mean output power in watts)" to "at least 43 plus 10 Log_{10} (mean output power in watts) decibels". In paragraph (d)(3), change the phrase "At least 43 plus 10 $\log_{10}$" to "At least 43 plus 10 Log_{10}". In paragraph (g)(2), change the phrase "(f_d in kHz)" to "(f_d in kHz)" and the phrase "50 plus 10 Log_{10} (P)" to "50 plus 10 Log_{10} (P) decibels". In paragraphs (h)(1), (h)(2) and (h)(3), change the word "log" to "Log_{10}" wherever it appears. In paragraph (h)(4), change the phrase "50 plus 10 log (P)" to "50 plus 10 Log_{10} (P) decibels". In paragraph (j)(1), change the phrase "((25/11) f_d^2)" to "((25/11) f_d^2)".

20. In Section 90.241(e), the paragraph is corrected by changing "Subpart P" to "Subpart Q".

21. Section 90.257 is corrected by changing paragraph (a)(1) to remove footnote 1 and the associated footnote references adjacent to frequencies 72.08, 72.16, 72.24, 72.32, 72.40, 72.96 and 75.64 MHz in the frequency table, and by changing paragraph (b)(2) to add "a" before "half-wave".

22. Section 90.259 is amended to conform it to the rules of Section 2.106, 47 C.F.R. § 2.106, and clarified by adding the sentence "Operation in the band 216-220 MHz is also secondary to the maritime mobile service and operation in the band 1427-1429 MHz is also secondary to the space operation service (earth-to-space)." following the sentence "Use of these bands is limited to telemetering purposes only and all operation is secondary to Federal Government operations." The sentence "Base stations authorized in this band shall be used to perform telecommand functions with associated mobile telemetering stations." is replaced by the sentence "Base stations authorized in these bands shall be used to perform telecommand functions with associated mobile telemetering stations."

23. Section 90.269(a)(1) is amended to conform to the emission designator format shown in section 2.201 of the Commission's rules, 47 C.F.R. § 2.201. The phrase "a 20F9 emission" is changed to "20K00F7W, 20K00F7X, 20K00F8W, 20K00F8X, 20K00F9W or 20K00F9X emissions".

24. Section 90.273(b) is corrected by changing the longitude coordinates for Cleveland, OH from "81^0 41' 5050" West" to "81^0 41' 50" West" and by changing the longitude coordinates for Detroit, MI from "83^0 02' 75" West" to "83^0 02' 57" West".

25. Section 90.281(b) is corrected by changing "licenses" to "licensees".

26. Section 90.419(e) is corrected by changing "(see § 90.241)" to "*(see* § 90.242)".

27. Section 90.555(b) is amended by adding the frequency 454.000 MHz; by changing the special limitations associated with the frequency 461.025 MHz from "Do" to "110 W"; by removing "; directional fixed" from the special limitations associated with the frequencies 466.025 MHz, 468.200 MHz, 469.525 MHz and 469.575 MHz; by changing the special limitation associated with the frequency 469.600 MHz from "110 W" to "Do", and by changing the special limitation associated with the frequency 469.675 MHz from "110 W, mobile; directional fixed" to "Do", to read as follows:

§ 90.555 Combined frequency listing.

* * * * *

(b) * * *

Frequency	Services	Special Limitations
	* * * * *	
453.975	PL	
454.000	IP	Oil spill.
454.0-455.0	(4)	
	* * * * *	
461.000	IB	Do.
461.025	IB	110 W.
461.050	IB	Do.
	* * * * *	
466.000	IB	Do.
466.025	IB	110 W, mobile.
466.050	IB	Do.
	* * * * *	
468.175	PS	Med 8.
468.200	IB	110 W, mobile.
468.225	IB	Do
	* * * * *	
469.500	IB	35 W, itinerant.
469.525	IB	110 W, mobile.
469.550	IB	35 W, itinerant.
469.575	IB	110 W, mobile.
469.600	IB	Do.
469.625	IB	Do.
469.650	IB	Do.
469.675	IB	Do.
469.700	IB	Do.
	* * * * *	

28. Section 90.613 is amended by changing the last sentence of the first paragraph to identify the frequencies listed in the table as base station frequencies, by changing "Mobile frequency (MHz)" in the accompanying tables to "Base frequency (MHz)", and by correcting the frequency listings for channels 80, 160, 240 and 320 in the "TABLE OF 896-901/935-940 MHZ CHANNEL DESIGNATIONS", to read as follows:

§ 90.613 Frequencies available.

The following table indicates the channel designations of frequencies available for assignment to eligible applicants under this subpart. Frequencies shall be assigned in pairs, with mobile and control station transmitting frequencies taken from the 806-824 MHz band with corresponding base station frequencies being 45 MHz higher and taken from the 851-869 MHz band, or with mobile and control station frequencies taken from the 896-901 MHz band with corresponding base station frequencies being 39 MHz higher and taken from the 935-940 MHz band. Only the base station transmitting frequency of each pair is listed in the table.

TABLE OF 806-824/851-869 MHZ CHANNEL DESIGNATIONS

Channel No.	Base Frequency (MHz)
* * * * *	

TABLE OF 896-901/935-940 MHZ CHANNEL DESIGNATIONS

Channel No.	Base Frequency (MHz)
* * * * *	
80	936.0000
* * * * *	
160	937.0000
* * * * *	
240	938.0000
* * * * *	
320	939.0000
* * * * *	

29. Section 90.617 is amended by changing the section heading to reflect the incorporation of Subpart M into Subpart S by the decisions in the *Report and Order*, PR Docket 86-404, 3 FCC Rcd 1838, adopted February 25, 1988. The number of channels in parentheses as shown in the heading of Table 4A is changed from 80 to 280, and the channel numbers associated with group numbers are changed to reflect a 40 channel spacing between channels within a group. Affected group numbers are 209 in Table 1 and 226 in Table 4A, to read as follows:

§ 90.617 Frequencies in the 809.750-824/854.750-869 MHz, and 896-901/935-940 MHz bands available for trunked or conventional system use in non-border areas.

* * * * *

TABLE 1-PUBLIC SAFETY CATEGORY-70 CHANNELS

Group No.	Channel Nos.
209	209-249-289-329-369

* * * * *

TABLE 4A-SMR CATEGORY 806-821/851-866 MHZ BAND CHANNELS (280 CHANNELS):

Group No.	Channel Nos.
* * * * *	
226	226-266-306-346-386

* * * * *

30. Section 90.621(a)(2)(i) is amended to conform to the intent of the *Report and Order* in PR Docket 86-404, 3 FCC Rcd 1838, Adopted February 13, 1988. The sentence "The 896-901/935-940 MHz band channel listed in the SMR pool are not available for conventional systems." is removed.

31. Section 90.629(b) is corrected by changing the postal area code (zip code) from "17325" to "17326" wherever it appears.

32. Section 90.651 is corrected by changing the postal area code (zip code) from "17325" to "17326" wherever it appears.

Part 94 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 94 continues to read as follows:

Authority: Sections 4, 303, 48 STAT., as amended, 1066, 1082, 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 94.65(g)(1) is amended by adding the frequency pair 6528.7/6873.7 MHz to the table. This frequency pair was inadvertently omitted from the table during the preparation of the *Third Report and Order*, Gen. Docket 82-334, 2 FCC Rcd 1050 (1987), to read as follows:

§ 94.65 Frequencies.

* * * * *

(g) * * *

(1) 800 kHz maximum authorized bandwidth channels:

Transmit (or receive) (MHz)	Receive (or transmit) (MHz)
6525.5	6870.5
6526.3	6871.3
6527.1	6872.1
6527.9	6872.9
6528.7	6873.7
6529.5	6874.5

* * * * *

3. Section 94.65(g)(2) is amended by changing the first frequency pair from 6525.5/6870.5 MHz to 6525.9/6870.9 MHz. This change conforms the rule to the intent of the rule making in the *Third Report and Order, supra*, to read as follows:

§ 94.65 Frequencies.

* * * * *

(g) * * *

(2) 1,600 kHz maximum authorized bandwidth channels:

Transmit (or receive) (MHz)	Receive (or transmit) (MHz)
6525.9	6870.9
6527.5	6872.5
6529.1	6874.1

* * * * *

 ☆ U.S. GOVERNMENT PRINTING OFFICE: 1989— 242-518/00022